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ARTICLES

THE ODYSSEY OF THE J-2: FORTY-THREE YEARS OF TRYING NOT TO GO HOME AGAIN*

NAOMI SCHORR** AND STEPHEN YALE-LOEHR***

INTRODUCTION

We wrote this article to address one question: Should a J-2 nonimmigrant exchange visitor[1] be subject to the two-year foreign residence requirement[2] of section 212(e) of the Immigration and Nationality Act (INA) if the J-1 principal is so subject?[3] In trying to answer that question, the authors

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1. Immigration regulations define a J-2 as the spouse and minor unmarried children of a J-1 exchange visitor. 22 C.F.R. § 62.2 (definition of accompanying spouse and dependents). *See also id.* ("The term [J-1 exchange visitor] does not include the visitor's immediate family."). *See also* 8 C.F.R. § 214.2(j)(1)(i). A minor is a person under the age of 21. 22 C.F.R. § 62.2 (definition of accompanying spouse and dependents).

2. This article uses the terms "foreign residence requirement," "home residence requirement," "two-year residence requirement," and "two-year rule" to refer to the same thing: the requirement under INA § 212(e), 8 U.S.C. § 1182(e), that certain aliens who entered the United States in J status must return to their country of nationality or last residence for two years before they are eligible for an H or L nonimmigrant visa, or for permanent residence in the United States.

3. INA § 212(e), 8 U.S.C. § 1182(e) states:

> No person admitted under section 101(a)(15)(J) or acquiring such status after admission (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence, (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) was a national or resident of a country which the Director of the United States Information Agency pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until it is established

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confronted additional issues that seem to have gone unresolved for close to half a century. If a J nonimmigrant is subject, be it J-1 or J-2, where can he fulfill the foreign residence requirement: in the country of his nationality or the country of his last residence? Does he have a choice? Where does a J-2 fulfill? In her J-1 spouse's country of nationality or last residence or her own? Can she combine periods that she spends in both? And how can she fulfill it? Do any periods of stay in the foreign residence count, or must there be a certain quality to periods spent in the foreign country? If a J-1 fulfills the two-year rule overseas but the J-2 remains in the United States, is the J-2 still subject? If so, why? And finally, who gets to decide if the alien is even subject in the first place?

The article is intended to serve several purposes: (1) to lead to an understanding of how J-2 nonimmigrants became subject to the foreign residence requirement; (2) to sort out where and how the two-year obligation may be fulfilled; and (3) to provide the legal rationale and justification for a new regulatory scheme that would render the J-2 exempt from the two-year foreign residence requirement. Our research found that there is very little in the legislative history and nothing in the INA that compels the conclusion that a J-2 is subject to the two-year foreign residence requirement. In fact, a strong argument exists that the J-2 is clearly not subject. For these reasons, we recommend that the State Department and the U.S. Citizenship and Immigration Services (CIS) change their current interpretations to exempt J-2s from the two-year foreign residence requirement.

We decided to write this article after listening to the remarks of a senior State Department official at a recent immigration law conference. That official was very clear in his view that the foreign residence requirement

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that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of a least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of section 214(l): And provided further, That, except in the case of an alien described in clause (iii), the Attorney General may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

This article assumes that the J-2 is not independently subject to the requirements of INA § 212(e) by virtue of prior participation in an exchange visitor program that rendered him so subject.

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should not be imposed on J-2 nonimmigrants. The remarks of that senior official follow:

> I looked at the history of the [exchange visitor] program, the 1940s bill, the extensive changes in 1961. There was a lot of legislative history in 1961 which was much relied on by the USIA [United States Information Agency] in promulgating regulations. I looked at that and then I looked at the calendar, and it's now 2002, and I asked myself: how do the 1940s, the 1960s, and 2002 relate. . . .The brain drain was the original concept, which is not very relevant now. I look at the great number of no objection letters[4] and I wonder why we go through this exercise. I am a proponent of having Congress or a Commission look at the entire process [with a view toward changing it]. As a purist, I want the law to reflect reality. . . . We should look at the legal premises and processes we engage in and have a review.
>
> Discussion Leader: What is the ability of J-2s to independently request a waiver of the two-year home residence requirement?
>
> State Department Official: By regulation and INS regulation, and based on the 1961 legislative history, J-2s are independently subject if the principal alien is subject. . . . Let's talk about the J-2s for a second. This is one area where it's now 2002 versus 1961 and you say, should they be subject? I've already engaged INS in discussions in considering changing that and not making J-2s subject.[5]

This article looks at the legal premises and processes we engage in, examines the legislative history of the exchange visitor program, reviews the questions about J-2s that have been raised in liaison meetings between the American Immigration Lawyers Association (AILA) and the Department of State and the United States Information Agency (USIA), provides excerpts from some of the statements about fulfillment issues that have been made by representatives of those governmental agencies at a variety of AILA conferences since 1998, and analyzes case law, legal opinions, and relevant

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4. There are four kinds of waivers of INA § 212(e): no objection requests, persecution waivers, interested government agency waivers, and exceptional hardship waivers. *See generally* 2 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 22.07 (2003) [hereinafter IMMIGRATION LAW AND PROCEDURE]. The vast majority of waiver requests are filed by people who have received "no objection" letters from their home government. In 2002, for example, the State Department received 7,189 no objection requests and recommended waivers for 7,114 of them. Marcia E. Pryce, Deputy Chief, Waiver Review Branch, Visa Office, U.S. Department of State, on the panel "Winning J-1 Waivers: One for the Gipper," at the 2003 Annual Conference of the American Immigration Lawyers Association (AILA) (conference tape no. 63). By contrast, there were only 21 persecution waivers that year; 20 had favorable recommendations. *Id.* The State Department received over 2,000 waiver requests from interested government agencies, most of them for physicians working in medically underserved or health professional shortage areas. "Most" of those received favorable recommendations. *Id.*

5. Remarks of Stephen K. Fischel, Director, Office of Legislation, Regulations and Advisory Assistance, Visa Office, U.S. Department of State, on the panel "J-1 Waivers and Demythicizing the Two-Year Home Residence Requirement," at the 2002 AILA Annual Conference (conference tape 26) [hereinafter Fischel 2002 Remarks].

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regulations. In so doing, it necessarily takes a long, hard look not just at the J-2 classification, but also the status to which it appends, the J-1.

LEGISLATIVE HISTORY

The Smith-Mundt Act of 1948

In 1948, Congress passed the United States Information and Educational Exchange Act,[6] popularly referred to as the Smith-Mundt Act. The main purpose of the legislation was to promote mutual understanding between the American people and other countries "to correct misunderstandings about the United States abroad."[7] In 1947, hearings were held by a Senate subcommittee on the proposed legislation, H.R. 3342, that had been introduced in the House of Representatives. Among those testifying was Secretary of State George C. Marshall, who urged the bill's passage:

> There is no question today that the policies and actions of the United States are often misunderstood and misrepresented abroad. The facts about the United States are withheld or falsified, and our motives are distorted. Our actions do not always speak for themselves unless the people of other countries have some understanding of the peaceful intention of our people. An understanding of our motives and our institutions can come only from a knowledge of the political principles which our history and traditions have evolved and of daily life in the United States.[8]

In recommending passage of the bill, the Senate Committee on Foreign Relations said that the proposed program to promote the exchange of persons, knowledge, and skills "cannot be gainsaid."[9] The report warned that:

> The American people and ideals, and our form of government are being misrepresented [and] distorted abroad by the propaganda of other nations. The prestige of the United States and democracy herself are suffering as a result of this unequal battle of ideas. We must be able to tell abroad the truth about the United States.[10]

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6. Pub. L. No. 80-402, 62 Stat. 6 (1948).
7. S. REP. NO. 80-573, at 1 (1947).
8. *Id.* at 8.
9. *Id.* at 10.
10. *Id.* The House report on H.R. 3342 was just as clear in its purpose:

> Words of truth can be most powerful weapons of peace if we use them properly and effectively . . . .The committee [is] convinced that by means of the safeguard provisions included in the bill, it is possible for the proposed program to become a powerful instrument for the dissemination of the truth about America, our ideals, and the rights and privileges which are ours as American citizens.

H.R. REP. NO. 80-416, at 8 (1947).

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In January 1948, the Senate Committee on Foreign Relations issued an additional report on H.R. 3342, reporting the bill favorably to the Senate and offering several amendments.[11] Before analyzing the bill and its amendments, the Committee thought it wise to step back and discuss the general considerations underlying the legislation. Foremost among them was the concern that:

> The present hostile propaganda campaigns directed against democracy, human welfare, freedom, truth, and the United States, spearheaded by the Government of the Soviet Union and the Communist Parties throughout the world, call for urgent, forthright, and dynamic measures to disseminate the truth. The truth can constitute a satisfactory counter-defense against actions which can only be described as psychological warfare against us as well as the purposes of the United Nations.[12]

Section 201 of the Smith-Mundt Act set the groundwork for the immigration portion of the exchange visitor program that we know today. It provided for the interchange between the United States and other countries of "students, trainees, teachers, guest instructors, professors, and leaders in fields of specialized knowledge or skill."[13] Those who entered to participate in the exchange program were to be admitted as "nonimmigrant visitors for business under clause 2 of section 3 of the Immigration Act of 1924, as amended."[14]

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11. S. REP. No. 80-811 (1948).
12. *Id.* at 4.
13. Smith-Mundt Act, *supra* note 6, § 201. The full text of § 201 provides:

> The Secretary is authorized to provide for interchanges on a reciprocal basis between the United States and other countries of students, trainees, teachers, guest instructors, professors, and leaders in fields of specialized knowledge or skill and shall wherever possible provide these interchanges by using the services of existing reputable agencies which are successfully engaged in such activity. The Secretary may provide for orientation courses and other appropriate services for such persons from other countries upon their arrival in the United States, and for such persons going to other countries from the United States. When any country fails or refuses to cooperate in such program on a basis of reciprocity the Secretary shall terminate or limit such program, with respect to such country, to the extent he deems to be advisable in the interests of the United States. The persons specified in this section shall be admitted as nonimmigrant visitors for business under clause 2 of section 3 of the Immigration Act of 1924, (43 Stat. 154; 8 U.S.C. 203), for such time and under such conditions as may be prescribed by regulations promulgated by the Secretary of State and the Attorney General. A person admitted under this section who fails to maintain the status under which he was admitted or who fails to depart from the United States at the expiration of the time for which he was admitted, or who engages in activities of a political nature detrimental to the interests of the United States, or in activities not consistent with the security of the United States, shall, upon the warrant of the Attorney General, be taken into custody and promptly deported pursuant to section 14 of the amended Immigration Act of 1924 (43 Stat. 162, 8 U.S.C. 214). Deportation proceedings under this section shall be summary and the findings of the Attorney General as to matters of fact shall be conclusive. Such persons shall not be eligible for suspension of deportation under clause 2 of subdivision (c) of section 19 of the Immigration Act of February 5, 1917 (54 Stat. 671, 56 Stat. 1044; 8 U.S.C. 155).

14. S. REP. No. 80-811, *supra* note 11, at 4.

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From the start, the exchange visitor program imposed a requirement that those coming to the United States to take part in the program must leave when their program objectives were realized. Anyone so admitted, the 1948 statute warned, who "fails to depart from the United States at the expiration of the time for which he was admitted . . . shall . . . be taken into custody and promptly deported."[15]

1952 Amendments

In 1952, the Smith-Mundt Act was amended and § 201 was changed to reflect the passage earlier that year of the Immigration and Nationality Act of 1952.[16] "The persons specified in this section," the amendment read, "shall be admitted as nonimmigrants under section 101(a)(15) of the Immigration and Nationality Act, for such time and under such conditions as may be prescribed by regulations, promulgated by the Secretary of State and the Attorney General."[17] Left unchanged were the general contours of the

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15. *See supra* note 13 for full text.

16. Pub. L. No. 82-414, § 402(f), 66 Stat. 163, 276-77 (1952). The full text of the amendment to § 201 is:

> (f) Section 201 of the Act of January 27, 1948 (Public Law 402, Eightieth Congress, second session, 62 Stat. 6) entitled [sic] "An Act to promote the better understanding of the United States among the peoples of the world and to strengthen cooperative international relations" is amended to read as follows:
>
> > SEC. 201. The Secretary is authorized to provide for interchanges on a reciprocal basis between the United States and other countries of students, trainees, teachers, guest instructors, professors, and leaders in fields of specialized knowledge or skill and shall wherever possible provide these interchanges by using the services of existing reputable agencies which are successfully engaged in such activity. The Secretary may provide for orientation courses and other appropriate services for such persons from other countries upon their arrival in the United States, and for such persons going to other countries from the United States. When any country fails or refuses to cooperate in such program on a basis of reciprocity the Secretary shall terminate or limit such program, with respect to such country, to the extent he deems to be advisable in the interests of the United States. The persons specified in this section shall be admitted as nonimmigrants under section 101 (a) (15) of the Immigration and Nationality Act, for such time and under such conditions as may be prescribed by regulations promulgated by the Secretary of State and the Attorney General. A person admitted under this section who fails to maintain the status under which he was admitted or who fails to depart from the United States at the expiration of the time for which he was admitted, or who engages in activities of a political nature detrimental to the interests of the United States, or in activities not consistent with the security of the United States, shall, upon the warrant of the Attorney General, be taken into custody and promptly deported pursuant to sections 241, 242, and 243 of the Immigration and Nationality Act. Deportation proceedings under this section shall be summary and the findings of the Attorney General as to matters of fact shall be conclusive. Such persons shall not be eligible for suspension of deportation under section 244 of the Immigration and Nationality Act.

17. Pub. L. No. 82-414, § 402(f), 66 Stat. 163, 277 (1952). Note that exchange visitors were to be admitted under INA § 101(a)(15), 8 U.S.C. § 1101(a)(15). At the time the statute did not specify a subsection of § 101(a)(15) for exchange visitors. The 1952 Act included only INA § 101(a)(15)(A)-(I).

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departure requirement: depart the United States at the expiration of the program, or be taken into custody and promptly deported.

1952 to 1956: Pushing the Envelope Too Far

What happened next? Many exchange visitors who completed their visits but who wanted to remain in the United States simply went north to Canada, turned around, and came back. Departure was required, and departure effected. Alternatively, they applied for private bills. Applied for? They flooded the Congress with private bills. Finally, President Eisenhower put his foot down by vetoing one of those private bills. In a letter sent to the Senate, President Eisenhower outlined his reasons for the veto.[18] Those reasons set the stage for the later imposition of what we know of as the two-year foreign residence requirement. Therefore we quote from the President's message at length. The exchange programs, Eisenhower said, could be maintained as instruments to promote international understanding and good will only:

> if we insist that the participants honor their commitments to observe the conditions of the exchange . . . . On the one hand, exchange aliens must return to the country from which they came. On the other hand, the United States must not permit either immediate reentry or other evasion of the return rule. Otherwise, the countries from which our exchange visitors come will realize little or no benefit from the training and experience received in the United States, and we shall fail to promote good will toward and better understanding of our way of life.
>
> Unfortunately, the United States Information and Educational Exchange Act does not specifically obligate exchange personnel to return to the country from which admitted and to remain there for a minimum period before being eligible to regain admission to the United States. Administrative requirements have been imposed to compensate for this lack of a specific statutory requirement.[19]

While noting that many private bills were approved based on "humanitarian and equitable considerations,"[20] the President decided that the bill before him did not warrant his approval, and took the opportunity to urge a statutory change:

> I feel it is my duty to disapprove this bill and at the same time to recommend enactment by the Congress of a clear statutory requirement that exchange personnel return home and remain there for a minimum period before being eligible to reenter the United States for permanent residence. . . . Legislation for this purpose has been forwarded to the

18. President Eisenhower's message was read to the Senate and may be found in 101 CONG. REC. 7,605-06 (1955).
19. *Id.* at 7605.
20. *Id.*

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> Congress by the Department of State this week. I urge its prompt consideration.[21]

1956: The Birth of the Blues

The legislation the President was referring to was S. 2562, which the Senate Committee on Foreign Relations endorsed. The purpose of the bill, as articulated by the accompanying Senate report, was to give effect to the President's 1955 recommendation to tighten up on the requirement that an exchange visitor depart the United States when his program was over.[22] Although, as the Senate report said, exchange visitors were prevented by law from changing their status or from applying for suspension of deportation orders, "there is nothing to deter them from qualifying for an immigration visa after leaving the United States, and from being readmitted immediately from a neighboring country such as Canada or Mexico."[23]

To deal with this problem, Congress amended § 201 of the Smith-Mundt Act by adding subsection (b), which read, in pertinent part:

> No person admitted as an exchange visitor under this section or acquiring exchange visitor status after admission shall be eligible to apply for an immigrant visa, or for a nonimmigrant visa under section 101(a)(15)(H) of the Immigration and Nationality Act, or for adjustment of status to that of an alien lawfully admitted for permanent residence, until it is established that such person has resided and been physically present in a *cooperating country or countries* for an *aggregate* of at least two years following departure from the United States. . . .[24]

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21. *Id.* at 7606.
22. S. REP. NO. 84-1608 (1956), *reprinted in* 1956 U.S.C.C.A.N. 2662.
23. *Id.*
24. Pub. L. No. 84-555, 70 Stat. 241 (1956) (emphasis added). The text of the statute follows:

> [S]ection 201 of the Act of January 27, 1948 (Public Law 402, Eightieth Congress, 62 Stat. 6, as amended by section 402 (f) of the Immigration and Nationality Act, 66 Stat. 163) entitled [sic] "An Act to promote the better understanding of the United States among the peoples of the world and to strengthen cooperative international relations" is amended by inserting "(a)" after the section number and by adding a new paragraph reading as follows:
>
> (b) No person admitted as an exchange visitor under this section or acquiring exchange visitor status after admission shall be eligible to apply for an immigrant visa, or for a nonimmigrant visa under section 101 (a) (15) (H) of the Immigration and Nationality Act, or for adjustment of status to that of an alien lawfully admitted for permanent residence, until it is established that such person has resided and been physically present in a cooperating country or countries for an aggregate of at least two years following departure from the United States: *Provided*, That upon request of an interested Government agency and the recommendation of the Secretary of State, the Attorney General may waive such two-year period of residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest: *And provided further*, That the provisions of this paragraph shall apply only to those persons acquiring exchange visitor status subsequent to the date of the enactment hereof.

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Quite interesting for historical purposes, and as a background for our later analysis of the scope of the foreign residence requirement, is the evolution of the language of this crucial provision. Therefore, in the interest of developing the record, we think that we should linger a moment here and talk about how the statutory language came to be as it was in 1956. Later, we will see how it evolved into what it is today.

First, who and what is an "exchange visitor"? According to State Department regulations of 1958, it means "any foreign national who has been selected by a sponsor to participate in the Exchange-Visitor Program."[25] Second, what is a "cooperating country"? Department of State regulations from that same year define "cooperating country" as "any country with which the Department is authorized to conduct exchange of persons under the provisions of section 201 of the act."[26] A 1961 House report stated that "[t]he United States generally considers all countries with which it maintains diplomatic relations as 'cooperating countries' within the meaning of the educational and cultural exchange program."[27] Therefore, virtually any country was a "cooperating" one, and an exchange visitor could fulfill the two-year departure rule in any country or combination of countries.

Third, we think it important to talk about a word that never made its way into the final version of the 1956 law. An earlier version of S. 2562 would have barred an exchange visitor from acquiring an immigrant visa or adjusting status until such person had resided and "been *continuously* physically present in a cooperating country or countries for an aggregate of at least 2 years following departure from the United States."[28] The Senate Committee on Foreign Relations thought it important to explain why the word "continuously" was omitted from the final law. In a section of the report entitled "Committee Changes in the Bill," they wrote:

> In the course of its deliberations, the committee's attention was drawn to the possibility that certain language in the bill . . . might be subject to misinterpretation. The language in question literally would have required continuous physical presence outside the United States for an aggregate of 2 years. This could be construed as meaning that if a former exchange visitor made a brief visit to the United States or to a noncooperating country, there would be a break in the 2-year period and he would be compelled to start his foreign residence all over again. Such a requirement appears altogether too severe and is unnecessary for

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25. 22 C.F.R. § 63.1(g) (1958). That regulation lists the exchange visitor categories as student, trainee, teacher, guest instructor, professor, and leader in a field of specialized knowledge or skill.

26. 22 C.F.R. § 63.1(f) (1958).

27. H.R. REP. No. 87-721, at 16 (1961). This extensive report, prepared after hearings by Subcommittee No. 1 of the House Committee on the Judiciary, contains a list of the forty-six cooperating countries at 16-20.

28. S. 2562, 84th Cong. (1955) (emphasis added).

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> the purposes of the bill. For this reason, the committee voted to delete the word 'continuously' which precedes the words 'physically present' from the bill.[29]

Finally, a discussion of the word "aggregate." Almost five decades after its inclusion in the statute, practitioners and government officials are still uncertain what it refers to or what it means.[30] It is a challenge to understand how one can be "continuously" physically present for an "aggregate" period of time. Those two terms are more or less the opposite of each other. Had Congress left the word "continuously" in the statute, which was deleted so that periods spent in the United States or a noncooperating country would not interrupt the two years, it would have meant that one could "aggregate" the two years in one or in *any combination* of cooperating countries. Note: there was not yet a requirement in 1956 to return to one's country of nationality or last residence. Once "continuously" was deleted, "aggregate" surely had to refer to tacking on disparate periods of time spent in any number of cooperating countries. We discuss these concepts later in this article.[31]

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29. S. REP. NO. 84-1608 (1956), *reprinted in* 1956 U.S.C.C.A.N. 2664.

30. An understanding of the term "aggregate" is quite important, since there is still a question about what the use of that word implies for purposes of fulfilling the foreign residence requirement. "Aggregate questions," as we will call them, fall into a number of categories. One question goes like this: Can the foreign residence requirement be satisfied by tacking together periods of time? For example, can an exchange visitor who spends six months a year in his country of nationality for four years, while spending the other six months in the United States in O-1 status, for instance, satisfy the requirement? Another class of question is along these lines: May the exchange visitor satisfy the requirement by adding together time he spends in the country of his nationality and the country of his last residence before entering the United States as an exchange visitor, if they are different? These questions are addressed later in this article.

31. This is not semantic conjecture on our part. See, for example, the 1961 discussion in H.R. REP. NO. 87-721, *supra* note 27, at 83. A concern was raised about the fate of an exchange visitor who might claim that, as a refugee, he could not return to the country of his origin or last residence for fear of persecution. Would a waiver be available to him? In an exchange between Walter M. Besterman, legislative assistant, and George W. Skora, Chief, Facilitative Services Branch, Office of Cultural Exchange, Mr. Skora said such a waiver would not be available. "On the basis, of course, that the language of the regulations and of the act itself, Public Law 555 of the 84th Congress, is that the person shall spend his 2 years' foreign residence in a country or countries, that is a cooperative country or countries, *and I will invite your attention to the plural.*" (Emphasis added.) The testimony then went off the record momentarily. When it returned, Mr. Besterman summarized what Mr. Skora had said:

> [I]nasmuch as the law requires the exchange alien to return to a country or *countries, the singular and the plural being used,* you take the position that since he is not forced to go to a country where he might be subject to persecution and he has a choice of another country, therefore you want him to comply with the law and select a country where he could stay for 2 years unharmed?" (Emphasis added.)

Mr. Skora replied: "Yes; that is correct."

This exchange is important because it underscores the Congressional intent to permit fulfillment of the two-year residence requirement in any country or combination of countries chosen by the exchange visitor, provided those countries were cooperating. After 1970, when the law was amended and limited fulfillment to the country of nationality or last residence, *see infra* note 63 and accompanying text, the State Department, by regulation and practice, began to insist that the former exchange visitor had *no choice* in the matter: He must fulfill only in the country where he *last* had a lawful permanent residence before entering on a J visa. *See infra* notes 64-65 and accompanying text,

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So, where are we in 1956? First, an exchange visitor was to enter the United States as a nonimmigrant under an unspecified subsection of INA § 101(a)(15). In what status did he enter? Consular officers originally issued "EX" visas,[32] and later on, J visas.[33] Second, an exchange visitor was not eligible for H status, for adjustment of status, or for an immigrant visa until he had departed the United States and then resided and was physically present in *any* cooperating country *or* countr*ies* for at least two years.

Waivers of the foreign residence requirement were available upon the request of an interested government agency if the alien's admission was found to be in the public interest.[34] Waivers were also available by regulation where "undue" hardship would result *to the exchange visitor* who was the spouse of a U.S. citizen or lawful permanent resident, or where fulfillment would be detrimental to a program in which the U.S. government was interested.[35]

What about the spouse and children of the exchange visitor? On what type of visa did they enter the United States? They were issued tourist visas,

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and the chart annexed to this article. That interpretation finds no support in the language of the statute or in the legislative history.

32. *See, e.g.*, H.R. REP. NO. 87-721, *supra* note 27, at 85 ("For the purpose of easy identification of the terms of their admission, it has been administratively decided to mark their nonimmigrant visas with the symbol 'EX.' ").

33. *Id.* at 76. In its hearings to amend the exchange visitor laws, Frank L. Auerbach, Assistant Director, Visa Office, Department of State, was asked by Walter M. Besterman about the category of visas issued to exchange visitors:

> Q. Am I correct in stating that the 'J' visa used by consular officers . . . derives from section 201 of the International Educational Exchange Act . . . and the Department's regulations, rather than from section 101(a)(15) of the Immigration and Nationality Act?
>
> A. When we were faced with that language in 1952, we had a reference to section 101(a)(15), but we did not have a specific reference to one of the subsections of 101(a)(15). Consequently, we tried to determine the intent of Congress as far as this specific reference to 101(a)(15) is concerned. It was our belief, as reflected in our regulations . . . that it would be the most desirable method of adding to the subdivisions of nonimmigrants, the subdivision which originally was referred to as 'EX,' standing for exchange visitors, and which more recently was changed to 'J' for reasons of management.

34. *See supra* note 24.

35. H.R. REP. NO. 87-721, *supra* note 27, at 31-32. The report at 40 cites to 22 C.F.R. § 63.6(f) for the waiver provisions. The regulatory provision in the 1958 edition of Title 22 of the Code of Federal Regulations states at § 63.6:

> The application [for a waiver of the two-year residence requirement] must be supported by documentary evidence that ineligibility for permanent residence would (a) impose undue hardship *upon the exchange visitor* that could not have been anticipated at the time exchange visitor status or the last extension of stay as an exchange visitor was granted. . . . (Emphasis added.)

Note there is no reference to so-called "qualifying relatives," the U.S. citizen or permanent resident spouse or child of the exchange visitor. By 1961 the regulation had changed, and a waiver was available if compliance would "impose undue hardship upon an exchange visitor who is the spouse of a United States citizen or of a lawfully resident alien that he could not have anticipated at the time he acquired exchange-visitor status." 22 C.F.R. § 63.6(c), as *reprinted* in H.R. REP. NO. 87-721, *supra* note 27, at 12.

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entered under INA § 101(a)(15),[36] and were not referred to as "exchange visitors."

1961: Who Remembers Quemoy and Matsu?[37]

In 1961, Congress passed the Mutual Educational and Cultural Exchange Act, popularly called the Fulbright-Hays Act,[38] which consolidated a variety of existing laws primarily concerned with the educational and cultural aspects of exchange programs.[39] Those laws covered the operations of five major programs,[40] which were growing in an ad hoc, piecemeal fashion, and were operating under different pieces of legislation and initiatives passed without much consideration for each other.[41]

Remember, this was 1961, and the Cold War was in full force. In its report on H.R. 8666,[42] the bill that was eventually adopted into law, the House Committee on Foreign Affairs said:

> Present-day governments give a high priority to educational and cultural exchanges. While political and economic affairs are the province of a relatively few individuals, educational and cultural programs are by their very nature a people-to-people activity. A lecturer catches young minds. A student gains experiences that shape his mature years. Cultural exchanges as in music or art can reach thousands at a time. In the current struggle for the minds of men, no other instrument of foreign policy has such great potential.[43]

The House and Senate carefully considered the legislation that became the Fulbright-Hays Act, particularly Subcommittee Number 1 of the House Committee on the Judiciary, which held extensive hearings on the immigration law aspects of that bill, § 109 of H.R. 8666.[44] It was the House bill that eventually passed, rather than the bill proposed by the Senate, S. 1154,[45] but both chambers published their own reports on the legislation. Important in this regard is the role played by the House Committee on the Judiciary,

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36. *See, e.g.*, 107 CONG. REC. H18,274 (Sept. 6-Sept. 13, 1961) ("Under existing law members of a grantee's family must enter on visitors' . . . visas.").

37. These two islands in the Taiwan Strait were the cause of several foreign policy crises during the Cold War, and the U.S. course of action was hotly debated by John Kennedy and Richard Nixon in three of the 1960 presidential debates. The point is that the Cold War has become old news. To the extent that it colored the foreign residence requirement of INA § 212(e), that requirement needs to be revisited.

38. Pub. L. No. 87-256, 75 Stat. 527 (1961).

39. *See, e.g.*, H.R. REP. No. 87-1094 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2759, 2760.

40. *Id.*

41. *See, e.g.*, S. REP. No. 87-372, at 3 (1961).

42. H.R. 8666, 87th Cong. (1961).

43. H.R. REP. No. 87-1094, *supra* note 39, at 2759.

44. The House Committee on Foreign Affairs prepared its own report on H.R. 8666: H.R. REP. No. 87-1094, *supra* note 39.

45. *Id.* at 2759.

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whose greater expertise in immigration matters was acknowledged by the House Committee on Foreign Affairs:

> The committee [House Committee on Foreign Affairs] recognized that amendments to the immigration laws are properly matters within the jurisdiction of the Committee on the Judiciary. For that reason the chairman of the Subcommittee on State Department Organization and Foreign Operations sent to the Committee on the Judiciary the amendments to the immigration law that were included in the introduced bill. Subcommittee No. 1 of the Committee on the Judiciary had prepared a report on immigration aspects of the International Educational Exchange Program (H. Rept. 721) *based on a lengthy study of this subject. That subcommittee was therefore fully aware of the problems involved.* Language was drafted and unanimously endorsed by all of the members of Subcommittee No. 1 and submitted to the Committee on Foreign Affairs. After careful study the committee included that language in section 109 in lieu of that included in the introduced bill.[46]

After hearings on the workings of the exchange program, Congress enacted legislation that added subsection J to INA § 101(a)(15):[47]

> SEC. 109. The Immigration and Nationality Act, as amended, is hereby amended as follows:
>
> (b) In section 101 (a) (15) (I) change the period to a semicolon at the end thereof and add the following:
>
> "(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Secretary of State, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or

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46. *Id.* at 2773 (emphasis added). The hearings were indeed extensive. The report issued by Subcommittee No. 1 of the House Committee on the Judiciary is 122 pages and contains a rich array of then-current and proposed legislation; regulations; reports from government agencies such as the Department of State, the Department of Health, Education, and Welfare, and the Immigration and Naturalization Service (INS); and comments by private agencies, including the Rockefeller Foundation, the W.K. Kellogg Foundation, the American Dental Association, the American Nurses' Association, the American Society of Medical Technologists, the American Institute of Architects, the National Association of Foreign Student Advisers, the Ford Foundation, the American Medical Association, the American Hospital Association, and the Institute of International Education. H.R. REP. NO. 87-721, *supra* note 27.

47. Pub. L. No. 87-256, § 109(b), 75 Stat. 527, 534-35 (1961).

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> receiving training, and the alien spouse and minor children of any such alien if accompanying him or following to join him."

It also amended INA § 212:[48]

> (c) In section 212 redesignate subsection "(e)" to read "(f)" and add a new subsection "(e)" to read:
>
> "(e) No person admitted under section 101(a)(15)(J) or acquiring such status after admission shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) until it is established that such person has resided and been physically present in the country of his nationality or his last residence, or in another foreign country for an aggregate of at least two years following departure from the United States: *Provided*, That such residence in another foreign country shall be considered to have satisfied the requirements of this subsection if the Secretary of State determines that it has served the purpose and the intent of the Mutual Educational and Cultural Exchange Act of 1961: *Provided further*, That upon the favorable recommendations of the Secretary of State, pursuant to the request of an interested United States Government agency, or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest: *And provided further*, That the provisions of this paragraph shall apply also to those persons who acquired exchange visitor status under the United States Information and Educational Exchange Act of 1948, as amended;"

The Spouse and Children of Exchange Visitors in 1961

The report of Subcommittee Number 1 of the House Committee on the Judiciary is 122 pages.[49] The House Committee on Foreign Affairs issued its own report, which numbers twenty-four pages.[50] The House debates on the

48. *Id.* § 109(c).
49. H.R. REP. NO. 87-721, *supra* note 27.
50. H.R. REP. NO. 87-1094, *supra* note 39.

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Act as reported in the Congressional Record fill another twelve pages.[51] The Senate report on its unenacted bill, S. 1154, is another forty-four pages.[52] What can we gather from the record about the dependents of exchange visitors? Did Congress explicitly intend to make them subject to the two-year foreign residence requirement? We note that the plain language of the statute itself apparently *does* subject the J-2 to the foreign residence requirement. "*No* person admitted under section 101(a)(15)(J) or acquiring such status after admission," is eligible for adjustment of status, or an immigrant visa, or an H visa, unless that person complies with the two-year foreign residence requirement. "No person" would appear to include J-2s.

However, in using the term "person," the Congress was merely using the same language it had used since 1948 in each version of the evolving exchange-visitor legislation. Recall, for example, that in 1948 a "person" who failed to depart at the end of his program was deportable. In 1956, when the two-year return requirement was statutorily imposed, the legislation read: "No person admitted as an exchange visitor"[53] could become an H nonimmigrant or a permanent resident unless he complied with the two-year rule. And "exchange visitor" was defined as "any foreign national who has been selected by a sponsor to participate in the Exchange-Visitor Program."[54] The term did *not* include the spouse and child of the exchange visitor, who were relegated to visitor's visa admissions and were thus not subject to the rule.

Did Congress actually intend to subject J-2s to the restrictions of INA § 212(e)? We think not. Before 1961, the spouses and children of exchange visitors entered on visitor visas, and their periods of admission were not necessarily coextensive with that of the principal. For *this* reason, primarily, the dependents of exchange visitors were admitted in J-2 status after 1961. In the House debates over the Fulbright-Hays Act, Representative John V. Lindsay said:

> A particularly needed improvement in the exchange program is provided by the amendment of the Immigration and Nationality Act so as to allow the spouses and children of visiting students and scholars to come into the United States under visa provisions similar to those applying to the grantees themselves. Under existing law members of a grantee's family must enter on visitors', as distinguished from student, visas, which frequently means that they may not be admitted for periods of the same duration as the grantees. The act would be amended so as to remove this cause of hardship and thus permit grantees and their families to come and remain in the United States together.[55]

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51. 107 CONG. REC. H18, 268-79 (Sept. 6, 1961-Sept. 13, 1961).
52. S. REP. NO. 87-372, *supra* note 41.
53. *See supra* note 24 and accompanying text.
54. 22 C.F.R. § 63.1(g) (1958).
55. 107 CONG. REC. H18,274 (Sept. 6, 1961-Sept. 13, 1961).

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In the entire record, that statement is all that the House of Representatives had to say about the terms of admission of J-2 nonimmigrants. In 158 pages of the legislative history of the congressional house that was acknowledged to be the moving force in this legislation, there was never even a hint that J-2 dependents were to be subject to the foreign residence requirement. In fact, in addition to providing a defined visa category for the dependents of exchange visitors, and in addition to permitting them to stay for the duration of the principal's program participation, the 1961 Act added another provision for the benefit of J-2 nonimmigrants: permission to request employment authorization.[56] Nowhere is there any suggestion that the House legislation intended to subject J-2s to the foreign residence requirement.

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56. H.R. CONF. REP. NO. 87-1197, *reprinted in* 1961 U.S.C.C.A.N. 2775, 2780 ("In accepting the language for a new category (J) visa it is the intention of the conferees that the language will not preclude employment by the principal or his spouse who entered under a (J) visa when such employment is not inconsistent with the program.").The stark distinction between J-1 participants and J-2 dependents has been recognized since 1961 in their disparate treatment under our tax and labor laws. The Fulbright-Hays Act amended § 3121(b) of the Internal Revenue Code regarding the definition of employment for purposes of the Federal Insurance Contribution Act (FICA), and IRC § 3306(c) regarding the definition of employment for purposes of the Federal Unemployment Tax Act (FUTA). *Id.* at 2780-82. The amendments exempted J-1 exchange visitors from payment of the FICA tax on earnings for performing services "to carry out the purposes for which they were admitted." *Id.* at 2781. They also relieved employers of the obligation to pay federal unemployment taxes on the same services that are exempted from the FICA tax. The exemptions, however, do not apply to J-2 dependents, who are *not*, under the tax laws, deemed to be exchange visitors "to carry out the purposes" of the exchange program. Treasury regulations still recognize the distinction. 26 C.F.R. § 31.3121(b)(19)(2) states:

> "If services are performed by a nonresident alien individual's alien spouse or minor child, who is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a)(15)... services are not deemed for purposes of this section to be performed to carry out a purpose for which such individual was admitted. The services of such spouse or child are excepted from employment under this section only if the spouse or child was admitted for a purpose specified in such subparagraph (F) or (J) and if the services are performed to carry our such purpose."

Department of Labor regulations also recognize the difference between J-1 exchange visitor participants and J-2 dependents:

> "*Exchange visitors.* (1) Exchange visitors (nonimmigrant aliens) may be temporarily in the United States under subparagraph (J) of section 101(a)(15)...to participate in exchange visitor programs....Work done by these exchange visitors to carry out the purpose for which they were admitted and for which permission has been granted by the sponsor, is excluded from employment."

20 C.F.R. § 404.1036(b). *Compare* 20 C.F.R. § 404.1036(c):

> "*Spouse and children.* Work done by a foreign student's or exchange visitor's alien spouse or minor child who is also temporarily in the United States under subparagraph (F), (J), (M), or (Q) of section 101(a)(15)...is not excluded from employment under this section unless that spouse or child and the work that is done meets the conditions of paragraph (a) or (b) of this section."

While exchange visitors are exempted from the FICA and FUTA provisions of the tax laws, it has always been recognized that their spouses are not. And that is because it has always been clear that the J-2 dependents are *not* present in the United States "to carry out the purposes" of the exchange program.

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The report of the Senate Committee on Foreign Relations that accompanied its bill, S. 1154, *the bill that was not enacted,* does contain one sentence about the foreign residence requirement as it pertains to J-2s:

> "To the extent that the spouse and minor children of the person admitted under the new category (J) are issued a visa in that category, they, too, would be subject to the 2-year residence abroad provision."[57]

How much importance should attach to that statement? The same Senate report proposed a number of other changes to the exchange visitor law that never saw the light of day. For example, the Senate bill would have amended INA § 241 to exempt from grounds for deportation the employment of J-2 nonimmigrants if such employment was for the support of the J-1 alien or the J-2 spouse.[58] The Senate bill also would not have amended § 212, but rather only § 245, to bar the adjustment of status of J nonimmigrants until they had complied with the two-year rule.[59] Finally, the Senate bill would have given a choice between visa categories for certain foreign scholars and medical personnel so that they "would not necessarily have to enter this country as exchange visitors and be subject" to the two-year rule.[60]

We think that Congress never intended in 1961 to make the spouse and minor children of J-1 aliens subject to INA § 212(e). The one sentence in the Senate report should not be given any weight, particularly because the Senate bill was not enacted into law.[61] Moreover, even if J-2s became subject to INA § 212(e) in 1961 based on the plain language of the statute, changes made by Congress in 1970 and subsequent regulatory changes made them no longer subject.

So, where are we at the end of 1961? Exchange visitors and their dependents are to enter on J visas. Still subject to the two-year foreign residence requirement, the exchange visitor must now return not to a

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57. S. REP. NO. 87-372, *supra* note 41, at 19.

58. *Id.* ("But such employment must be needed for the support of the alien or his accompanying spouse or minor children.") *See also id.* at 34. That proposed employment provision was not enacted. Rather, employment was authorized for any purpose. In 1983, however, the INS enacted a regulation that turned the Senate language upside-down. That regulation, which is still in effect, prohibits J-2 employment if "this income is needed to support the [J-1] participant." 48 Fed. Reg. 23,159 (May 24, 1983) (amending 8 C.F.R. § 214.2(j)(1)(v)). We note in passing that, while many regulations seem to make little sense, this one has to sit at the top of the list of inanities. The J-2 spouse can work for any reason: to pass the time, to make extra "throw-away" money, or to do important scientific research. She can displace any worker, receive a salary below prevailing wage, work seven or seventy hours a week. But let the J-2 use some of that money to support the J-1, and she's no longer authorized to work. If anybody sees the logic in that, please notify the authors.

59. S. REP. NO. 87-372, *supra* note 41, at 19.

60. *Id.* at 18.

61. *See* NORMAN J. SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 48.18 (6th ed. 2000) ("Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment."); *id.* at § 48.01 ("[S]tatements made by persons in favor of a rejected or failed bill are meaningless and cannot be used as an extrinsic aid [in interpreting a statute]."); Lyons v. Ohio Adult Parole Authority, 105 F.3d 1063, 1071 (6th Cir. 1997); McDonald v. General Motors Corp., 784 F. Supp. 486, 498 (M.D. Tenn. 1992).

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"cooperating country," but to the country of his nationality or his last residence, or to another foreign country, provided that residence in another foreign country serves the purpose and the intent of the Act. The spouse of the exchange visitor is permitted to accept employment. By strict statutory language, though not necessarily by legislative intent, the J-2s are also subject to the foreign residence requirement. But where they are to return to – to the country of the J-1 or to their own country of nationality or last residence – is nowhere mentioned.

1970: A More Reasonable Approach

It does not take a great deal of imagination to figure out that the blanket two-year rule, which applied to all exchange visitors, rubbed some people the wrong way. One of the purposes of the exchange-visitor program, after all, was to engender good will, and good press, for the United States. So what happened? The exact opposite. The law produced hardships on individuals and generated "hard feelings toward the United States on many occasions," and "needlessly created problems for the government and universities, hospitals, and other private American institutions."[62]

To correct some of the problems, in 1970 Congress amended INA § 212(e), and limited its application to an exchange visitor who entered on a J visa, or acquired that status after entry, to participate in a program that was financed by the U.S. government or the government of his nationality or last residence, or whose field of specialized knowledge or skill was on the so-called "skills" list.[63] Also changed were the fulfillment requirements of § 212(e). While before 1970 the requirement could be satisfied in the "country of nationality,"

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62. H.R. REP. NO. 91-851 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2750, 2571. *See also Hearings before Subcommittee No. 1 of the House Comm. on the Judiciary: Nonimmigrant Visas*, 91st Cong., Serial 91-9, at 9 (1969) [hereinafter Serial 91-9] ("[T]he effect of this blanket application of section 212(e) has given rise to some difficulties in administration, produced some hardships on individuals, generated hard feelings toward our country in some cases, and been a source of friction between our Government and universities, hospitals, and other private American institutions."). This result was anticipated by the Senate in 1961. In its report accompanying S. 1154, it said:

> The classification of a nonimmigrant alien as an exchange visitor for visa purposes created by Public Law 402 – proposed for regularization in a new category (J) – was designed to apply to persons entering this country in connection with the official exchange programs of the U.S. Government. In practice, however, use of the informally designated 'exchange visitor visa' has been extended to cover large numbers of nonimmigrant aliens teaching or otherwise employed here who are not sponsored by the U.S. Government or supported in any way with public funds. These persons thus are automatically brought under the 2-year residence abroad requirement; the result often has been to deprive our universities of needed foreign faculty members and to encourage a flood of waiver applications . . . . This problem is not resolved in S. 1154.

S. REP. NO. 87-372, *supra* note 41, at 20. Bear in mind that, until 1970, for the alien to be eligible for H-1 classification, a job offer had to be temporary, similar to the H-2B category of today. *See* 2 IMMIGRATION LAW AND PROCEDURE, *supra* note 4, at § 20.08[2]. Therefore, that visa category was not appropriate for many jobs, and foreign nationals coming to work in the United States often entered as J-1 exchange visitors instead.

63. Pub. L. No. 91-225, § 2, 84 Stat. 116, 116-17 (1970). The 1970 amendment provides in full:

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"last residence," or any other country if sanctioned by the Secretary of State, the 1970 law limited it to the country of nationality or last residence.

We have seen that the two-year rule was limited in its application to make it easier for exchange visitors to remain here, to satisfy the requirements of U.S. employers, and to avoid causing unnecessary ill-will. Why were the countries of fulfillment changed? Was it to serve the "program or policy" considerations of the exchange program? Was it because fulfilling the requirement in a country other than the country of nationality or last residence was detrimental to the purpose of exchanging cultural, educational, and training experiences? No. It was none of that. The reason Congress limited the countries of fulfillment was simple: "This provision has proved extremely difficult to administer."[64] When an exchange visitor opted to fulfill the two-year rule in a country other than the country of his nationality or last residence, it was not until *after* he'd spent the two years in that other country that the Secretary of State would determine whether it had served the purpose of the Fulbright-Hays Act. Often, the result was not equitable or uniform.[65]

SEC. 2. Section 212(e) of the Immigration and Nationality Act (8 U.S.C. 1182(e) is amended to read as follows:

"(e) No person admitted under section 101(a)(15)(J) or acquiring such status after admission whose (i) participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United Stated or by the government of the country of his nationality or his last residence, or (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) was a national or resident of a country which the Secretary of State, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: *Provided*, That upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government agency, or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest: *And provided further*, That the Attorney General may, upon the favorable recommendation of the Secretary of State, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Secretary of State a statement in writing that it has no objection to such waiver in the case of such alien."

64. H.R. REP. NO. 91-851, *supra* note 62, at 2756.

65. *See, e.g.*, Serial 91-9, *supra* note 62, at 10 ("As it now stands, exchange visitors going to a third country cannot know whether residence there will fulfill the requirement until the 2 years have expired. There is no assurance, in the absence of objective and clearly definable criteria, that a prolonged stay will meet the requirements of the legislation. . . . So the Department favors the elimination of residence in a third country as a possible means of meeting the 2-year foreign residence requirement in the future.") (statement of John Richardson, Jr., Assistant Secretary of State for Educational and Cultural Affairs). *See also* Velasco v. I.N.S., 386 F.2d 283 (7th Cir. 1967). In that case, the two-year rule was held not satisfied by a Filipina national who was also a landed immigrant

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What is crucial about the 1970 amendments for J-2 purposes is that the 1970 law did away with the blanket application of INA § 212(e), and limited it *only* to a person who enters on a J visa, or acquires J status while in the United States, to "participate in" certain exchange visitor programs or who, at the time of admission or acquisition of J status, was a "national" or "resident" of a country requiring persons "engaged" in a "field of specialized knowledge or skill." How then can the restrictions of § 212(e) apply to the J-2 spouse or child of a J-1 nonimmigrant when they are not here to "participate" in any exchange-visitor program? Is there any rule of statutory construction that would apply such a restriction by *implication* to a class of alien not specifically mentioned in the statute? We can't think of any.

Was anything at all said about J-2s in the legislative history accompanying the 1970 Act? In the twelve pages of the House Judiciary Committee Report on the amendments to the Act, and in the 102 pages of hearings of Subcommittee Number 1 of the House Committee on the Judiciary, not a single word was said about J-2s. Does that silence mean that Congress intended them to remain subject to the two-year rule? We don't think so.

The regulations between 1961 and 1972 reflect this changed interpretation.[66] Beginning in 1963, the regulations included immediate family members as part of the definition of exchange visitor, thereby also making J-2s subject to INA § 212(e). In 1972, however, after the 1970 Act changes, the regulations were changed to make only "participants" subject to INA § 212(e). The regulations limited "participants" to J-1 visa holders, not J-2s. Nevertheless, through imprecise analysis and incomplete review of the legislative history, J-2s are still considered subject to the two-year residence requirement.

CASE LAW

Matter of Gatilao

In 1966, Mr. Gatilao, the J-2 architect husband of an exchange visitor, sought to adjust his status to become a lawful permanent resident.[67] His application was denied because, the Immigration and Naturalization Service (INS or Service) said, he was subject to the two-year foreign residence requirement of INA § 212(e) and had neither satisfied it nor had its application waived. The Service offered him voluntary departure. Mr. Gatilao declined the offer, arguing that he was not subject to the two-year rule

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in Canada, when she lived in Canada for two years following the exchange program. The Secretary of State's determination that such residence did not serve the purposes of the exchange program was a matter of administrative discretion, not to be set aside except upon a showing of "clear abuse." *Id.* at 286.

66. See the chart at the end of this article.

67. Matter of Gatilao, 11 I. & N. Dec. 893 (BIA 1966).

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because he had entered the United States not as an exchange visitor, but merely as the spouse of one. He claimed that Congress did not intend the foreign residence requirement to apply to J-1 dependents and that the "statute does not require its application."[68]

The Board of Immigration Appeals (BIA or Board) had no trouble disposing of that argument, finding it to be "without merit."[69] Why? It looked at the plain language of the statute, which said that "*no person* admitted under section 101(a)(15)(J)" is eligible for adjustment of status unless he has complied with the two-year rule. This, the BIA said, is "an unequivocal statement, free of ambiguity, which does not require interpretation."[70]

The Board had a curious response to the congressional-intent argument raised by the respondent. Mr. Gatilao argued that the language of the statute may seem clear, but in fact Congress never intended to apply the two-year rule to J-2s.[71] The Board answered that Congress did intend the two-year rule to apply to J-2s. In support of this conclusion it cited the language in the Senate report accompanying S. 1154, the bill that was *not* enacted: "To the extent that the spouse and minor children of the person admitted under the new category (J) are issued a visa in that category, they, too, would be subject to the 2-year residence abroad provision."[72]

Matter of Tabcum

After the 1970 amendments to INA § 212(e), the application of the two-year requirement to J-2 spouses was again challenged. This time the respondent, Mrs. Tabcum, was the J-2 spouse of an exchange visitor whose participation in an exchange program had been funded by the U.S. government.[73] Counsel argued, intelligently, that the bar to adjustment was changed by the 1970 Act, which precluded the adjustment only of *participants* in government-financed programs, and not to the accompanying spouse or child. The Service disagreed. But this raises a question unanswered by the Service: If the Board in *Gatilao* gave plain meaning to the language of the statute, which said "no person" admitted in J status could adjust without complying with the foreign residence requirement, how could the Service not apply the "plain meaning" standard to the amended statute, which strictly limited application of the rule to *participants*?

The Service said that the J-2 was permitted to enter the country in that status, that she was the "beneficiary" of the "financial aspects" of her husband's participation in the program, and thus "she too derived benefits

68. *Id.* at 894.
69. *Id.*
70. *Id.*
71. As we argue above at notes 58-61 and accompanying text, the respondent's argument was probably correct in this regard.
72. *See supra* note 57 and accompanying text.
73. Matter of Tabcum, 14 I. & N. Dec. 113 (Reg. Comm'r 1972).

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from such program."[74] It looked at the legislative history of the 1970 amendments and found it "makes no reference to any intent on the part of Congress to extend the more liberalized provisions of the amended section 212(e) to the accompanying spouse."[75] That, of course, is true. The legislative history *is* silent on that point. But that could mean a number of things. It may mean that Congress never imagined that limiting the embrace of § 212(e) to participants would burden the immediate family members under the rule.

To justify its conclusion, the Service then engaged in a kind of "back-formation" reasoning, never the basis of a strong argument, to find Mrs. Tabcum subject to § 212(e). It said that since the regulations permitted the spouse and children of a J-1 alien subject to § 212(e) to be included in his waiver application, they must therefore be subject to § 212(e) themselves.[76] And finally, in case we needed some icing on the cake, the Service offered this up for digestion: If the J-2 spouse were found not to be subject, and were permitted to adjust her status to lawful permanent resident, her J-1 spouse would then be eligible to apply for adjustment based on hardship grounds, "gaining him back-door access to a benefit to which he otherwise would not be entitled."[77]

Whether a coincidence or not, it is interesting to note that on the very day that *Tabcum* was decided, the State Department amended its regulations to state that if an alien is subject to INA § 212(e), so are his spouse and child.[78] The State Department offered no reason for the change.[79]

We'd like to say something about the Service's notion that the J-2 "benefits" from the program, particularly because the J-2, unlike most other nonimmigrant dependent categories, has always been permitted to be em-

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74. *Id.* at 114. What if the J-1 husband in *Tabcum* had been subject because of the skills list and not because he received government financing? The Service did not explore that possibility.

75. *Id.* at 115.

76. "If we were to concede arguendo that counsel's interpretation is proper," the Service reasoned, "there would be no need for such regulatory provision since all J-2 aliens . . . would no longer be subject to the foreign residence requirement." *Id.*

77. *Id.* To be eligible for a hardship waiver, a J-1 exchange visitor must establish that his residence abroad for two years would result in exceptional hardship to his U.S. citizen or lawful permanent resident spouse or child both if they were left behind and if they went with him. INA § 212(e), 8 U.S.C. § 1182(e). We do not know how many hardship waivers were granted in 1972, the year that *Tabcum* was decided, but doubt that it exceeded the paltry several hundred that get through both the USCIS and the Department of State today. If the Service was worried about "floodgates" opening, we hardly think that this trickle should have been a cause for concern.

78. 37 Fed. Reg. 7156 (Apr. 11, 1972) (amending 22 C.F.R. § 41.65(b) by adding subsection (b)(3) to state: "If an alien is subject to the 2-year foreign residence requirement of section 212(e) of the Act, the spouse or child of such alien shall also be subject to such requirement if such spouse or child is admitted to the United States pursuant to section 101(a)(15)(J) of the Act for the purpose of accompanying or following to join such alien").

79. In fairness to the State Department, no immigration regulations of that time indicated why certain changes were made. The agency simply published the changed regulation, without commentary, in the Federal Register. We suspect the same is true for other agency notices in the Federal Register back then.

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ployed in the United States. While this is a benefit,[80] it was not out of governmental largesse that the J-2s were accorded the opportunity to work here. Through the exchange-visitor program, the United States was trying to bring the best and the brightest to our country, those who would not only add their skills and knowledge, take home newly gained expertise (hopefully to redound to our benefit), and spread the good word about America abroad. We wanted to attract the "cream of the crop,"[81] the "upper crust of society."[82] One of the only ways to do that was to permit the J-2s, often professionals themselves, to work here. Mr. Gatilao, who was an architect, is an example of this. Permitting J-2s to work was as much a benefit to us as to them.

Sheku-Kamara v. Karn

In 1978, Mr. Sheku-Kamara entered the United States in J-1 status to participate in a U.S. government-funded program.[83] He was clearly subject to INA § 212(e). In 1979, he changed programs to a privately funded one sponsored by the University of Pennsylvania from which he derived no government financing. In 1979, he married in London. A year later, while he was still in the privately sponsored J-1 program, his wife and child entered the United States in J-2 status. When his wife applied for adjustment of status in 1983, the Service turned her down, finding that she was subject to § 212(e) because of the *prior* program her husband had been participating in *before* he married her.

The court decided that a Service regulation, 8 C.F.R. § 212.7(c)(4), governed the outcome of the case.[84] That regulation reads today as it did then: "A spouse or child admitted to the United States or accorded status under section 101(a)(15)(J) of the act to accompany or follow to join an exchange visitor who is subject to the foreign residence requirement of section 212(e) of the Act is also subject to that requirement." Although the plaintiff had argued that the regulation did not apply to the circumstances of the case, the court tossed that argument aside, holding that it ignored the "plain reading" of the regulation.[85]

And then, the court added more. It referred to *Tabcum* for the proposition that since the J-2 benefits from an exchange program, she should be subject to § 212(e) if the J-1 is subject. Never mind that in *Sheku-Kamara* there was no government financing from which the J-2 benefited. "The scope" of *Tabcum* is "broader," the court explained. The fact that Mrs. Sheku-Kamara

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80. We note in passing that this employment benefit does not carry such a high price tag when applied to spouses and children of L and E nonimmigrants. Only J-2s are subject to a two-year foreign residence requirement.
81. H.R. REP. NO. 87-721, *supra* note 27, at 85.
82. 107 CONG. REC. H18,271 (Sept. 6, 1961-Sept. 13, 1961).
83. Sheku-Kamara v. Karn, 581 F. Supp. 582 (E.D. Pa. 1984).
84. *Id.* at 583.
85. *Id.* at 584.

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received not even a penny of government financing did not matter because she "received the more significant benefit of having been permitted to enter the United States." Moreover, held the court, if the plaintiff were permitted to adjust her status, it would create the "anomalous result" of putting the derivative Mrs. Sheku-Kamara in a better position than her husband, who was still subject to § 212(e).[86]

Finally, finding the plaintiff subject to the two-year rule was "consistent with" one of the primary objectives of the exchange visitor program – "to facilitate the impartation of live impressions of the United States and its culture to other societies."[87] One can only imagine the impression Mrs. Sheku-Kamara imparted upon her return home. But in this regard, even the court had to acknowledge that it may have been stretching in its interpretation of the purposes of the exchange visitor program. "Even though," the court said, the impartation of live impressions "is directed primarily towards the principal alien," the court "does not see why it cannot be equally applicable to a spouse and child . . . thereby subjecting them to the foreign residence requirement."[88] How about this reason why: Congress didn't intend that result.

GENERAL COUNSEL OPINIONS

On May 9, 2000, AILA and the Department of State had a liaison meeting. This was one of the questions on the agenda:

> AILA thought it was settled law that, when a J-1 has satisfied the two year residency requirement, the J-2 dependent is no longer subject to the two year residency requirement even if the J-2 dependent has not individually satisfied the two year home residency requirement. U.S. Information Agency's ("USIA") General Counsel had confirmed this position several times in the past. It appears that DOS is taking a contrary position in citing FAM 40.202 note 3, which we do not believe is on point. AILA would request clarification and confirmation that: (a) once the J-1 satisfies the 2 year home residency requirement, the J-2 is no longer subject to the two year foreign residency requirement; and (b) instructions will be sent to the field explaining this result.

The State Department responded:

> VO [The State Department's Visa Office] has concluded that individuals who come to the United States in J-2 status are subject to the same requirement as the J-1, and are obligated to satisfy the two-year foreign residence requirement even when the principal J-1 has already fulfilled

86. *Id.*
87. *Id.* at 585.
88. *Id.*

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the obligation. VO invites AILA to provide the cited opinion of the former USIA general counsel's office together with any other legal sources in support of AILA's position.[89] How does this question arise? Suppose that a J-1 exchange visitor who is subject to § 212(e) returns to his country of nationality for two years, leaving his J-2 wife behind. She gets accepted into a university, picks up an F-1 visa, and while he's home fulfilling the requirement, she's here studying. Two years later her husband returns on an H-1B visa, and with her studies complete, she would like to change her status to H-1B as well. Any problem with this? This question was asked of the INS in September 1989, and the answer was quite reasonable. Since a J-2 nonimmigrant is subject to the foreign residence requirement only because the J-1 is so subject, "it is reasonable to conclude that in fulfilling the . . . requirement, a J-1 principal has effectively conferred the same status to the J-2 spouse or dependent child. . . . Thus, a J-2 spouse . . . should be considered to have fulfilled the two year home residence requirement if the J-1 principal has done so."[90] That opinion wasn't left to stand. In November 1989, the INS General Counsel was asked: "What is the applicability of the two-year foreign residency requirement to a J-2 dependent under 212(e) of the INA where the J-1 principal has already fulfilled that obligation?"

The answer? "A J-2 dependent is legally obligated to satisfy the two-year foreign residency requirement even where the J-1 principal has already fulfilled that obligation."[91]

How did the General Counsel arrive at that opinion? It cited *Gatilao*,[92] *Tabcum*,[93] and *Sheku-Kamara*,[94] cases that had nothing to do with the question at hand, for the general proposition that if the J-1 principal is subject to INA § 212(e), so is the J-2. Admitting that "[n]either the regulations nor the cases cited address the issue," the opinion said, "in our view, it makes no legal difference whether or not the principal has already fulfilled the obligation: these J-2 dependents (those where the principal alien is subject to the requirements) must independently satisfy the two-year residence requirement of 212(e) of the Act."[95]

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89. Minutes of the DOS-AILA Liaison Meeting (Mar. 30, 2000), *available at* http://www.aila.org/infonet (last visited Sept. 9, 2003) (document no. 00050905).

90. Letter from Lawrence J. Weinig, Deputy INS Assistant Commissioner for Adjudications, to attorney Michael Maggio (Sept. 27, 1989), *reproduced in* 66 Interpreter Releases 1223-25 (Oct. 30, 1989). A similar letter was written about the J-2 son of a principal who had obtained a waiver of the two-year rule, asking whether the son was covered by the waiver. The INS replied yes. Letter from Lawrence J. Weinig, Deputy INS Assistant Commissioner for Adjudications, to attorney Daniel M. Kowalski (Nov. 8, 1989), *reproduced in* 66 Interpreter Releases 1432-33 (Dec. 18, 1989).

91. INS General Counsel Opinion No. 89-75, *Your Memorandum of September 27, 1989; Obligation of J-2 Dependents to Satisfy Two-Year Foreign Residency Requirement under 212(e)*, CO 214j-P (Nov. 13, 1989) (on file with authors).

92. *See supra* notes 67-72 and accompanying text.

93. *See supra* notes 73-82 and accompanying text.

94. *See supra* notes 83-88 and accompanying text.

95. INS General Counsel Opinion No. 89-75, *supra* note 91.

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That opinion, which makes no sense to us, apparently didn't sit well even with some INS officials, who asked the General Counsel to reconsider its decision.[96] The General Counsel didn't budge. Its second opinion, issued in 1990, held that because the J-2 "shares the benefits of the J-1's exchange program and is properly considered a *participant* in the program for incurring the foreign residence requirement," the J-2 must satisfy that requirement independently of the J-1.[97]

That is where things stand today. Does this make any sense? While AILA was not correct that it is "settled law" that the J-2 is no longer subject when the J-1 satisfies the foreign residence requirement, it was correct that the USIA had voiced its opinion that perhaps the "settled law" should be changed. These were the comments of the USIA's then-Assistant General Counsel in 1997:

> Q. J-1 goes home and fulfills the two-year home residence requirement; J-2 spouse and children do not. Are the J-2s still subject to the two-year home residence requirement?
>
> A. We have in the past considered the status of the J-2 dependents to be derivative in nature. They're subject because the principal is subject; it's derivatively applied. When the principal is waived the dependents are derivatively waived. Now, we've recently had a couple of situations come up where the dependents have stayed in country having adjusted [sic] to another status. If you continue to apply the theory we have applied in the past, then the argument would be that they have satisfied the requirement as well. That is currently on the table with INS as well. There'll be definitive pronouncements on that.[98]

There never was another "definitive pronouncement" on this issue, and the only official policy remains the INS General Counsel opinions. Those

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96. Lawrence Weinig asked that the opinion be reconsidered.

97. INS General Counsel Opinion No. 90-17, *Your February 20, 1990 Memorandum "Your Legal Opinion Regarding Applicability of the Two-Year Foreign Residence Requirement to J-2 Dependents,"* CO 212.43-C, CO 214j-C (Apr. 4, 1990) (on file with authors) (emphasis added). We note in passing that the USIA regulation at the time defined "participant" as "any foreign national who has been selected by a sponsor to participate in an Exchange-Visitor Program and who is seeking to enter or has entered the United States temporarily on a J-1 visa." 22 C.F.R. § 514.1 (1990). In other words, *not* a J-2. Even if the 1990 INS General Counsel opinion was considered the final word then, it is not now. A 1998 precedent decision held that General Counsel opinions are not binding on the agency, and may be disregarded. Matter of Izummi, 22 I. & N. Dec. 169, 196 (INS Assoc. Comm'r Examinations 1998). *See generally* Stephen Yale-Loehr, Matter of Izumii*: Why All Immigration Lawyers Should be Worried*, 17 AILA Monthly Mailing 793 (Sept. 1998), *available at* http://www.aila.org/infonet (last visited Oct. 21, 2003) (document no. 98081840). *See also* Highlights of AILA-INS General Counsel Liaison Meeting (Sept. 25, 1998), 17 AILA Monthly Mailing 1146 (Dec. 1998), *available at* http://www.aila.org/infonet (last visited Oct. 21, 2003) (document no. 98110940) ("4. INS stands by the language in the precedent decision of Matter of [Izummi] . . . on the issue of the INS not being bound by opinions of INS General Counsel or written statements of policy from officials in authoritative positions within INS.").

98. Stanley Colvin, USIA Assistant General Counsel, Remarks on the Panel "How to Put Together a J-1 Waiver (Except IMGs)," at the 1997 AILA Annual Conference (conference tape no. 96).

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opinions, of course, make little sense, and have been questioned both by the INS itself and by the USIA. It seems clear that just as the J-2 should not be subject to INA § 212(e) in the first place, so too a J-2 should be relieved of the foreign residence requirement once the J-1 has satisfied the obligation or had it waived.

IF A J-2 IS SUBJECT TO INA § 212(E), SURELY SHE CAN APPLY FOR A WAIVER OF THE OBLIGATION

Whether right or wrong, since 1961 J-2s have been deemed subject to INA § 212(e) if the J-1 principal is subject. Since she is subject, it would only be fair if she were able to apply for a waiver of her own foreign residence requirement. Curiously, nothing in the statute or the regulations permits that. Instead, the reasoning seems to be that since the J-2's § 212(e) obligation is not independently incurred, but is derived from the J-1, the only way for the J-2 to apply for a waiver – barring certain circumstances – is through inclusion in the J-1's waiver application.[99]

Under what circumstances, if any, can a J-2 independently seek a waiver? For years, the USIA and State Department have accepted waiver applications if the J-1 principal died or the J-1 and J-2 divorced. In those cases, the State Department will itself act as an interested government agency in requesting a waiver of the § 212(e) obligation.[100] The State Department has recently suggested that in sympathetic circumstances, it might also act as an interested government agency in domestic abuse cases.[101]

WHITHER THOU GOEST, I WILL GO.[102] BUT WHERE IS IT?

Fulfillment Issues

Suppose a J-1 exchange visitor, a research scholar receiving U.S. government funding, is a national of the United Kingdom and a landed immigrant in

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99. *See* 8 C.F.R. § 212.7(c)(5) ("The alien's spouse and minor children, if also subject to the foreign residence requirement, may be included in the application, provided the spouse has not been a participant in an exchange program."). From this provision, which permits inclusion of the J-2 in the J-1's application, comes the position that the J-2 has no independent means of seeking a waiver, since there is no regulation that expressly provides for it. Note, however, that there is also no regulation that precludes it.

100. *See, e.g.*, Fischel 2002 Remarks, *supra* note 5. *See also* Comments on the Panel "J-1 Exchange Program – Preparing Waivers," at the 1999 AILA Annual Conference (conference tape no. 119); 2 IMMIGRATION LAW AND PROCEDURE *supra* note 4, at § 22.07[2][b][viii]. It would seem that the State Department will act as an interested government agency whether or not the principal J-1 would have been eligible for a waiver. For example, if the J-1 visitor had been the recipient of $50,000 in Fulbright Fellowship funding to engage in activities not of vital interest to the United States, it is fairly safe to say that a waiver would never be recommended. Nevertheless, it would appear that the widow or divorcee of that exchange visitor would be eligible for favorable consideration at the State Department.

101. Fischel 2002 Remarks, *supra* note 5.

102. *Ruth* 1:16, in which Ruth said to Naomi: "For whither thou goest, I will go; and where thou lodgest, I will lodge; thy people shall be my people."

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Canada. Assume that his J-2 wife is a national of Nigeria, who had spent the four years before her admission to the United States in England. She entered on an F-1 student visa, but obtained J-2 status after marrying the J-1 principal. She plans to fulfill the two-year requirement, but she doesn't know where to go. Does she have to return to the place that her J-1 spouse is obligated to return to? Or to *her* country of nationality or last residence? And if she has to go where her husband goes, where is it? England or Canada?

The Statute Says "Or"

We are often told that government officials cannot be held to what they say at conferences. We agree that remarks made in that venue, often in response to unexpected questions, are not to be given the weight of general counsel opinions or policy memoranda. Nevertheless, they are instructive – in this case of the confusion that exists in this area – and so we think it useful to review the pronouncements of State Department and USIA officials made over the past few years at AILA conferences.

The remarks of these officials are almost verbatim, but were edited to turn spoken comments, often disjointed, into proper written prose. We are not presenting these comments to criticize changing views, or to hold the government to opinions voiced one year that may have changed a year later. Rather, we have gone to the trouble of listening to and transcribing these tapes to give manifestation to the utter confusion that surrounds J fulfillment questions, and to urge a rational change to the law.

In 2003, a State Department official took part in a panel at the annual AILA conference on J-1 issues. He was asked whether a J-1, subject because of the skills list, who was a national of one country and a permanent resident of another country, could choose which country he had to return to. One of the other panelists offered his understanding of the rule: There was no choice. The J-1 must return to the country of his *last* residence before admission on the J-1 visa. When the State Department official was asked about the panelist's statement, he said "his understanding is correct."[103] But, asked the discussion leader, what about a national of the United Kingdom, who entered from Canada, where he is a landed immigrant, who received government funding from England? Where does he return to? "A good question," responded the official, who continued by adding that since the statute says "last" residence, "the statute wins." He goes back to Canada. Realizing, of course, that the area is too confused for rational discussion, the State Department official said that "this is an issue we will revisit." Here are some of the exchanges:

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103. Stephen K. Fischel, Director, Office of Legislation, Regulations and Advisory Assistance, Visa Office, U.S. Department of State, Remarks on the Panel "Winning J-1 Waivers: One for the Gipper," at the 2003 AILA Annual Conference (conference tape no. 64) [hereinafter Fischel 2003 Remarks].

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Q. One last question on fulfillment and that is, can it only be in one country or can it be in two if you have a division between nationality and last residence? Could there be the aggregate?

A. That is a good question. Fortunately, I haven't been faced with that question until this moment. So my off-the-cuff remark would be to base it on the country of the last residence where they're subject, that's where they would have to serve their two years.

Q. I just want to wind things up on fulfillment issues. J-2 fulfillment issues. What is the obligation of a J-2 in terms of fulfillment of the two-year home residence obligation? J-1 is subject – that means the dependents derive a two-year home residence obligation. Issue: J-1 goes back and fulfills, the J-2 lawfully or even unlawfully remains in the U.S. Does the J-2 still have a two-year home residence requirement once the J-1 fulfills?

A. By regulation, both INS and our regulations subject the J-2 to the two-year requirement.

In 1999, the USIA General Counsel was asked the same question on where fulfillment is to take place. He said that the agency procedure is that the J-1 does not have a choice. He acknowledged that whenever the question comes up, "legal interpretation is appropriate." And then he said something quite refreshing in its frankness: "I don't think any of us here are able to articulate it as well as it can be articulated."[104] Here are some of the exchanges on that panel, with responses by the General Counsel and a State Department waiver review officer:

Waiver review officer: We go by where [the J-1] was a legal permanent resident when he acquired his J-1 status. There are two blocks on the IAP-66 form: his country of citizenship or legal permanent resident, and we go by that, the last permanent residence.

Q. Does the alien have a choice between country of citizenship and country of last permanent residence?

Waiver review officer: No.

Q. The statute says it does. The statute says that 212(e) can be satisfied in either country of citizenship or country of last permanent residence. I don't understand. The statute says "or."

Waiver review officer: Well, they do not have a choice.

Q. According to you. The thing is that the agency's procedure is that you do not have a choice. For example, this is a physician case. Physician is a citizen of country A; has last been a permanent resident in country B. But country A signed a "physician need" statement. You're saying that your position has always been that the 212(e) obligation can

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104. Les Jin, then the USIA General Counsel, Remarks on the Panel "J-1 Exchange Program – Preparing Waivers," at the 1999 AILA Annual Conference (conference tape no. 120) [hereinafter Les Jin 1999 Remarks].

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only be fulfilled in the country signing the physician need statement, which in this case is not even the last permanent residence. Again I am just saying that I don't think that is supported by the statute.

Q. What is the result? The result is that they are saying that the person has to go back to the country A, the country of citizenship. Here is the real world situation: You've got a physician who's been a citizen of whatever . . . Egypt . . . becomes a citizen or landed immigrant of Canada. Canada does not sign a physician need statement. So therefore they go back to their home country and they say, "home country sign a physician need statement." Your position is that the 212(e) obligation can only satisfied in the country signing the physician need statement. So what I am hearing today, and I think that this is your position, is that in non-physician cases the country of residence required to fulfill the 212(e), because you have to have physical presence in the country to which you have the two year home residence requirement, there is *no* choice. It is normally the country of last permanent residence except in the case of physicians where it becomes automatically signing the physician needs statement. I mean that is a correct statement . . . is that correct?

General Counsel: Let me answer that . . . and my answer is going to be almost a non-answer in the sense that I think it's one of those things that I know has come up and whenever it comes up this is definitely one of those things where legal interpretation is really appropriate. I know that we do have a difference of views but to be honest, I don't think any of us here are able to articulate it as well as it can be articulated. I mean if this is still an ongoing conversation that you want to have and you want us to take another shot at formally explaining it to you, we'd be glad to do it.[105]

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105. This question was still unresolved a few years later, and was raised at the AILA Liaison Meeting with the Visa Office in March 2002:

> Q. Residence, Chargeability and Compliance - INA 212(e) imposes a two year home residence requirement, which needs to be fulfilled in the country of "nationality or . . . last residence." For physicians, it is our understanding that the DOS maintains that the home residence requirement can only be fulfilled in the country issuing the physician need statement, even in instances in which there is a split between country of residence and country of nationality. Would L/W please verify the current position of the DOS on this topic?
>
> A. The exchange visitor regulations, which we have inherited from USIA and which have not been modified, state that physicians must provide a statement of need from the government of the country of their last legal permanent residence at the time they acquire J-1 status. Such statements must provide written assurance, that there is a need in that country for persons with the skill the alien physician seeks to acquire and shall be submitted to the Educational Commission for Foreign Medical Graduates by the participant's government. Accordingly, the residence requirement should be served in the country that issued the statement of need, and to which the physician was a legal permanent resident at the time the he/she acquired the J-1 visa status.

Report of the AILA/Visa Office Liaison Meeting (Mar. 7, 2002), *available at* http://www.aila.org/infonet (last visited Oct. 9, 2002) (document no. 02031472). Since 1977, all foreign physicians who enter the United States in J-1 status to receive graduate medical education or training are automatically subject to the two-year foreign residence requirement. *See* the Health Professions Educational Assistance Act of 1976, Pub. L. No. 94-484, § 601(b), 90 Stat. 2243, 2300 (amending

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In 1998, the Assistant General Counsel of the USIA was asked the same question. Does the exchange visitor have a choice of country of fulfillment when the country of his nationality is not the same as the country of his last residence? He said that the J-1 had "no choice" in the matter:

> I can tell you what lies behind it. It's a matter of statutory construction. In determining what country you return to it's the country you entered from and it's not a choice, it's a factual matter. You're either entering from your country of nationality, a no-brainer. "I'm a Brit and I'm coming from England," *or* your country of last legal permanent residence. Last legal permanent residence is "I'm a Brit and I went to Australia and I'm entering the United States from Australia." That's what that has always meant. That's what it means as far as we're concerned, and we're the ones who get to interpret that.[106]

Well, that is *not* what that has "always meant" and they're *not* the ones who get to interpret that. Let's review some of the minutes of liaison meetings between USIA and AILA. First October 7, 1986:

> Question: With regard to the place where an EV with a 2YRFRR must reside to be considered to have properly fulfilled that requirement, what is the effect when the EV is a national of two countries? Of one country *and* holds lawful permanent residence in another country?
>
> Answer: Except for situations where the 2YRFRR was incurred due to government funding, *in many instances it is possible for the EV to properly fulfill the 2YRFRR by spending that period of time in either country or a combination of the two countries. (CAUTION*: Differing fact situations may not permit this result in all cases.)[107]

Now the minutes of the May 14, 1987 meeting:

> Question: An alien from an Eastern Europe country got out and went to France. He received a J-1 visa to come to the U.S. While in the U.S. he applied for asylum. INS says no to the asylum request on the ground that he received safe haven in France. Quere [sic] whether USIA in a situation like this would determine that he was obliged under the regulations to go back to e.g., Russia, not France.
>
> Answer: USIA does not involve itself in asylum questions. . . . In most cases where a person is a citizen of one country and resident of

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INA § 212(e), 8 U.S.C. § 1182(e)). *See generally* IMMIGRATION LAW AND PROCEDURE, *supra* note 4, at § 22.04[7].

106. Stanley Colvin, then the USIA Assistant General Counsel, Remarks on the Panel "Exchange Program Sponsors: Designation, Program Maintenance, Responsible Officers," at the 1998 AILA Annual Conference (conference tape no. 82).

107. Liaison Meeting Minutes between AILA and the USIA (Oct. 7, 1986), *reprinted in* 6 AILA MONTHLY MAILING 559, 565 (Nov. 1986) (emphasis in the original).

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> another they apply the law most beneficial to him. If the alien is a citizen of Nigeria but a resident of the U.K. (they require more of an affiliation than merely a tourist) they apply U.K. law.
>
> If the alien came here and is studying something on the Nigeria skills list they apply the law most beneficial to him. Therefore, they would apply U.K. law. *Likewise, if he has to go home and could go to two countries he could go to either one as far as USIA is concerned. Here, either the country of citizenship or last legal permanent residence would be used.*[108]

If the words in INA § 212(e) are given the meaning that Congress intended, it is clear that these pronouncements are correct.[109] Congress first intended that an exchange visitor fulfill the foreign residence requirement in *any* country or countries. In 1961, it permitted the residence requirement to be fulfilled in the country of nationality, last residence, or another country if approved by the Secretary of State. And in 1970, for reasons of administrative convenience, it limited fulfillment to the country of nationality or last residence. Had Congress meant that only the "last" residence would satisfy the requirement, as the State Department now seems to insist, the statute would have said that the alien must reside and be physically present in the country of his "last residence," which could either be the country of nationality or not.

The question of country of nationality versus country of last residence was squarely put to Congress in 1969 during the House's three days of hearings on H.R. 445, the bill that amended INA § 212(e) in 1970. For example, the written statement of Dr. Ruhe, director of the division of medical education of the American Medical Association, noted:

> The intent of the amendment in H.R. 445 is clearly to avoid the "brain-drain" of skilled professionals from underdeveloped countries, the hope being that the requirement of 2 years of residence in the country of nationality or of previous residence will help those countries in meeting the professional manpower needs. In some instances, however, the country of last residence has not been a "less developed" country. Consequently, if participants are permitted to return to the country of their last residence before becoming eligible for permanent status in the United States, this may have no beneficial effect upon the health care problems or the "brain-drain" from the country of nationality. A classic example is the case of citizens of India who proceed first to

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108. Report of the Meeting of the USIA Liaison Committee of the American Immigration Lawyers Association with Richard L. Fruchterman, Assistant General Counsel, United States Information Agency (May 14, 1987), *reprinted in* 7 AILA MONTHLY MAILING 1074, 1079 (July-Aug. 1987) (emphasis added).

109. *See* discussion of the words "aggregate," "continuously," "cooperating country or countries," *supra* notes 30-31 and accompanying text.

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> the United Kingdom and then to the United States from England as exchange visitors. If such participants are required merely to return to England there will be no alleviation of the brain-drain from India. We believe, therefore, that the proposed amendment may improve the present situation but that it will not correct it completely.[110]

Aside from his written statement, Dr. Ruhe raised this issue two other times, trying to engage the Congressmen in a discussion.[111] Not once did the committee follow up with questions, read a statement into the record, or exhibit the slightest interest in dealing with this question or in changing the law to accommodate those concerns. In fact, in one of its earlier incarnations, H.R. 445 would have allowed satisfaction of INA § 212(e) in the country of nationality or in the country of last residence, "[p]rovided, that such residence in the country of his last residence shall be considered to have satisfied the requirements of this subsection only if the Secretary of State determines that it has served the purpose and intent of the Mutual Educational and Cultural Exchange Act of 1961."[112] In other words, Congress considered limiting compliance to only the country of nationality, with *possible* compliance in the country of last residence, if the Secretary of State approved it. That provision was never implemented because it has always been the intent of Congress for the exchange visitor to have a choice in which country, or in which countries, he or she could fulfill the foreign residence requirement.

WHO GETS TO DECIDE WHETHER A J-1 IS SUBJECT TO § 212(E)?

According to a former Assistant General Counsel of the USIA, that agency got to decide who is subject to the two-year rule.[113] However, that is not what two former INS General Counsels said on the issue. In 1989, a senior INS official asked the General Counsel which agency had the authority to determine whether an exchange visitor was subject to § 212(e): the USIA or the INS. The short answer was that the INS had that authority.[114] While the USIA had "considerable" authority in supervising foreign exchange programs, its functions under INA § 212(e) were "narrowly drawn."[115] No alien is subject to the foreign residence requirement unless he has been "admitted" to the United States as an exchange visitor or had his status changed to become one, and he may not adjust status if subject. Only the INS, not the

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110. Serial 91-9, *supra* note 62, at 61-62.
111. *Id.* at 79, 94.
112. *Id.* at 102.
113. *See supra* note 106 and accompanying text.
114. INS General Counsel Opinion, *The Respective Roles of the INS and USIA in Administering INA section 212(e)*, CO 214j-P, CO 212.43-P (Mar. 27, 1989), *reprinted in* 66 INTERPRETER RELEASES 888 (Aug. 7, 1989), 9 AILA MONTHLY MAILING 460 (July/Aug. 1989).
115. *Id.*, 66 INTERPRETER RELEASES at 890.

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USIA, had the authority to admit exchange visitors or adjust their status.[116]

The General Counsel's opinion is rather straightforward in its conclusion and clear in its reasoning. Clarity, however, is not the hallmark of § 212(e) discussions. During the March 14, 1991, liaison meeting between USIA and AILA, the following exchange took place:

> The Immigration and Naturalization Service has reaffirmed that it has the sole authority to determine whether an exchange visitor is subject to the two-year home residence requirement. Are there circumstances, however, in which the Service discusses an individual case or general issues with the USIA? If so, is there a structure or procedure for these contacts? What general issues might have been discussed or decided?
>
> Answer: USIA disagrees with INS' position categorically, and they are trying to resolve this within the executive branch.[117]

Several years later, a different INS General Counsel revisited this issue. In a list of resolved issues sent to the then-current and former General Counsels of AILA, the INS General Counsel wrote: "The issue of whether an alien is subject to the two-year home residence requirement is an issue of law to be determined by the Immigration and Naturalization Service."[118]

"RESIDE" AND "PHYSICALLY PRESENT"

The statute states that an alien subject to INA § 212(e) may satisfy the requirement if he has "resided and been physically present" in the country of nationality or last residence for an "aggregate" of two years. Did Congress imply that more than "physical presence" is required by adding the word "resided"? There is no discussion of this in any of the hundreds of pages of legislative history that we examined. According to the general rules of statutory construction, which we accept, by using the words "resided" *and* "physically present," Congress meant more than a mere physical presence; by adding the word "reside" it intended there be some *quality* to the amount of time present in the country (or countries) of fulfillment.

But how did "reside" evolve into the current regulatory requirement that the exchange visitor must have spent two years in the country of his or her last "legal permanent residence"?[119] By what rule of construction can

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116. *Cf.* Matter of Ajaelo, 15 I. & N. Dec. 85 (BIA 1974) (the USIA's determination that an exchange program is government funded, which can lead to application of the foreign residence requirement, is not binding on the Justice Department). Currently, the authority lies with the USCIS.

117. Report of the Meeting of the U.S.I.A. Liaison Committee of the American Immigration Lawyers Association with Alberto J. Mora, General Counsel, United States Information Agency (Mar. 14, 1991), *reprinted in* 11 AILA MONTHLY MAILING 321 (May 1991).

118. *INS General Counsel List of Resolved Issues* (Dec. 10, 1999), *available at* http://www.aila.org/infonet (last visited Sept. 19, 2003) (document no. 99122271).

119. 22 C.F.R. § 62.2 (2003).

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fulfillment in a country in which one "resides" turn into a country in which one has a "legal permanent residence"? Consider the following changes over the years:

> **1963:**
> As used in this part, the term "country of his last residence" means either the country of which the exchange visitor was a national at the time he acquired status as an exchange visitor or the last foreign country *in which he resided* before he acquired status as an exchange visitor.[120]

> **1972:**
> Country of his nationality or his last residence means either the country of which the exchange visitor was a national at the time he acquired status as an exchange visitor or the last foreign country *in which he had permanent or legal residence* before he acquired status as an exchange visitor.[121]

> **1977:**
> Country of nationality or last residence means either the country of which the exchange visitor was a national at the time status as an exchange visitor was acquired or the last foreign country in which the visitor had *permanent or legal residence* before acquiring status as an exchange visitor.[122]

> **1979:**
> Country of nationality or last *legal* residence means either the country of which the exchange visitor was a national at the time status as an exchange visitor was acquired or the last foreign country in which the visitor had a *legal permanent residence* before acquiring status as an exchange visitor.[123]

Over the course of sixteen years, the law slowly changed by regulation, with no discussion in the Federal Register explaining why the definitions were altered. Having reviewed fifty years of legislative history, we believe that Congress never meant to impose a requirement that an exchange visitor return to a legal permanent residence.

Remember, INA § 212(e) uses the word "reside," not legal permanent residence. The two terms are quite different. INA § 101(a)(33) defines "residence" as the "place of general abode."[124] The same section in turn says

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120. 22 C.F.R. § 63.1, *as added by* 28 Fed. Reg. 1630 (Feb. 21, 1963) (emphasis added).
121. *Id.*, *as added by* 37 Fed. Reg. 5940, 5941 (Mar. 23, 1972) (emphasis added).
122. *Id.*, *as added by* 42 Fed. Reg. 59,379, 59,380 (Nov. 17, 1977) (emphasis added).
123. 22 C.F.R. § 514.1, *as added by* 44 Fed. Reg. 18,008, 18,009 (Mar. 26, 1979) (emphasis added). This is the definition of country of nationality or last legal residence found in the regulations today at 22 C.F.R. § 62.2 (2003).
124. INA § 101(a)(33), 8 U.S.C. § 1101(a)(33) (2003).

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that "general abode" means the "principal, actual dwelling place in fact, without regard to intent."[125] The legislative history to the 1952 Act makes clear that the INA's definition of "residence" is a codification of the term as expressed by the Supreme Court two years earlier in *Savorgnan v. United States*.[126] In that case the Court held that an individual had established a "residence" in Italy by living there from 1941 to 1945, even though she had no intention of establishing a permanent residence there.[127] By contrast, "lawfully admitted for permanent residence" is a separately defined term. It means the status of having been lawfully accorded the privilege of residing permanently in the United States.[128]

Even the USIA recognized that not every country has an immigration status equivalent to the U.S. concept of lawful permanent residence. In fact, the USIA interpreted its regulation somewhat liberally, at least back in 1987. At AILA-USIA liaison meetings that year the USIA admitted that it had no formal standards for determining country of last residence.[129] The USIA did volunteer that aliens working and living in a country have a "permanent residence" in that country.[130] Students in a country would require a closer analysis. Citing specific examples, the USIA stated that "as to Commonwealth aliens in the U.K. they [the USIA] normally accept the U.K. as the country of last residence . . . . For example, an Indian living in the U.K. and there for a while. Here they [the USIA] will use the U.K."[131]

The concept of "firm resettlement" in asylum law offers an interesting contrast to the residence issue for § 212(e) purposes. A person is barred from applying for asylum if he or she has "firmly resettled" in another country before coming to the United States.[132] The regulations consider a person firmly resettled if "prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement."[133] Courts and the BIA consider a variety of factors in determining whether a potential asylum seeker has firmly resettled in another country.[134] One of those factors is the length of stay. While case law is not consistent on this issue, at least some cases have held that a short stay in another country can

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125. *Id.*
126. 338 U.S. 491 (1950). The case is summarized in H.R. REP. NO. 82-1365, at 33 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1684.
127. *Savorgnan*, 338 U.S. at 505-06.
128. INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (2003).
129. AILA-USIA Liaison Report (Nov. 25, 1987), *reprinted in* 7 AILA MONTHLY MAILING 130, 133 (1988).
130. *Id.*
131. *Id.*
132. INA § 208(b)(2)(A)(vi), 8 U.S.C. § 1158(b)(2)(A)(vi) (2003).
133. 8 C.F.R. § 208.15 (2003). Some exceptions that apply to this rule are not relevant for purposes of this article.
134. *See, e.g.*, Matter of Soleimani, 20 I. & N. Dec. 99, 106 (BIA 1989).

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constitute firm resettlement and thus bar a person from applying for asylum. For example, in one case the Ninth Circuit agreed with the BIA that the asylum applicant had firmly resettled in Armenia even though his stay lasted only a few months.[135] The court noted that the applicant had the legal right to remain in Armenia as a refugee if he chose to, even though he apparently did not exercise that right.[136] It is ironic that such a short stay can constitute "firm resettlement" to bar someone from asylum, but a longer stay will not help a person meet the two-year foreign residence requirement if it was not his last legal permanent residence before he entered the United States.

Another contrast appears in the State Department's rules concerning where a person can apply for an immigrant visa. An alien usually must apply for an immigrant visa in the consular post having jurisdiction over his place of "residence."[137] The State Department's Foreign Affairs Manual (FAM) defines "residence" for this purpose by first quoting INA § 101(a)(33).[138] It then adds: "If an alien can show that his or her 'principal, actual dwelling place' is or was in a specified country, the fact that the alien does/did not have, or intend to have, the status of a lawful permanent resident or any other legal status in that country is not relevant."[139] Why is it that an alien does not have to show lawful permanent resident status in another country to establish residence for purposes of applying for a green card overseas, but must do so to meet the foreign residence requirement of INA § 212(e)? It doesn't make sense.

Finally, to add to the confusion, when the INS General Counsel was asked by AILA to opine on the country of fulfillment for an exchange visitor who was subject because of the skills list, here's what he said:

> If an alien's country of citizenship is different from his country of last residence, the INS will look at the skills list of the country of last residence to determine whether the exchange visitor is subject to the

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135. Tsatourian v. INS, No. 96-70804, 1997 U.S. App. LEXIS 36551 (9th Cir. Dec. 12, 1997).
136. *Id.* at *4.
137. 22 C.F.R. § 42.61(a) (2003).
138. U.S. DEP'T OF STATE, 9 FAM § 42.61 n.1.2 (1987).
139. *Id.* Although State Department regulations mandate fulfillment in the country of nationality or "legal permanent residence," a note in the FAM does not exact that requirement. "Residence for 2 years in a country other than the country of nationality or last legal residence does not satisfy the requirements of INA § 212(e)." 9 FAM § 40.202 n.1.2 (1987). The note does not speak of last legal *permanent* residence.

When it comes to determining the residence of an exchange visitor in other areas of the law, an amusing gloss is provided by the Internal Revenue Service. In *Wirth v. Commissioner of Internal Revenue*, 61 T.C. 855 (Tax Court 1974), a Polish former J-1 visitor was not permitted to deduct expenses he incurred for meals and lodging during a year in which he held J-1 status and was "away from home." The tax court held that a taxpayer cannot be "away from home" unless he has a "home," and that the home of a taxpayer without a permanent and fixed place of abode "is located wherever the taxpayer happens to be," in this case, in the United States. *Id.* at 859. With tongue in cheek we ask: Does that mean that the exchange visitor could have fulfilled his § 212(e) obligation any place he happened to return to?

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two-year home residence requirement. For this purpose, the definition of "residence" in INA § 101(a)(33) will be applied.[140]

I CAN'T GO HOME AGAIN

Impossibility of Performance

What happens in the following case? An exchange visitor gains citizenship in a country other than her home country. By so doing, and by operation of law, she loses the citizenship of her home country and therefore is no longer entitled to reside there following the exchange program. Surely, in that case, a waiver of the § 212(e) obligation should be available. For a very short time, the answer was, yes. A year later, it turned to no.

In March 1997, a practitioner asked the Assistant General Counsel of the USIA about the status of an exchange visitor from the People's Republic of China (PRC), who upon obtaining citizenship in Canada, automatically lost his PRC citizenship. "You rightly pointed out," said the USIA, "that your client's obligation under section 212(e) of the Immigration and Nationality Act was void due to impossibility of performance." Moreover, the USIA was impressed by the argument: "We believe this line of reasoning is more than persuasive and will be applying it in future cases involving the same fact pattern."[141]

That policy was short-lived. A little more than a year later, the USIA changed its mind and announced a new policy on impossibility of performance:[142]

> Recently, the Agency has been approached and requested to recognize a theory that certain aliens subject to the return home requirement should be granted a waiver because their home country has revoked, by operation of law, their citizenship due to the acquisition of citizenship or legal permanent residence in another country. This theory suggests that the section 1182(e) requirement should be waived because the loss of citizenship has made it impossible for the alien to fulfill this requirement. Having reviewed this matter at length, the Agency cannot adopt this theory as a matter of policy and will not recommend the grant of a wavier based solely upon the loss of home country citizenship. In many cases, other means of fulfillment, such as the utilization of a nonimmigrant visa for entry into the home country are available.
>
> The Agency will review, on a case by case basis, those extraordinarily few instances where fulfillment. . . . is impossible due to facts totally

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140. Report of AILA General Counsel (on issues resolved at a meeting with INS General Counsel on April 23, 1998), III. Section 212(e), *available at* http://www.aila.org/infonet (last visited Dec. 11, 2003) (document no. 98042390).

141. Letter from Stanley Colvin, USIA Ass't General Counsel, to attorney Alan S. Musgrave (Mar. 31, 1997), *reprinted in* Greg Siskind et al., J VISA GUIDEBOOK App. G47-1 (2003).

142. The USIA policy was published in 63 Fed. Reg. 42,233 (Aug. 7, 1998).

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beyond the control of the waiver applicant and which were not predictable consequences of action on the part of the applicant.[143]

Why did the USIA walk away from its reasonable approach announced in 1997? The answer to that question was provided in 1999 by the then-General Counsel of the USIA:

> Some of you remember about a year ago this question was a hot topic not only with our discussions with AILA, but also through the Internet. We'd given some indication that because impossibility of performance, that is because China would revoke the citizenship of somebody in that situation who acquired citizenship somewhere else, that we might be very sympathetic to finding a way so that that person is not barred forever from coming to the U.S. because of impossibility of performing the two-year return home requirement.
>
> I think that as you can imagine, if you can think about our mission, for us to adopt that position without being very careful about it is very difficult because basically . . . that would provide some real opportunities for people to perhaps even circumvent the purpose of the exchange and to set something up so that there is impossibility of performance. So we looked very carefully to see how we could make sure that someone didn't get frustrated and never be able to come to the United States at the same time protecting our underlying interest, which is the exchange visitor program. I think what we found is that perhaps the impossibility of regaining your citizenship in China is not as impossible as we originally thought, so what we did was publish and articulated an impossibility of performance standard. That is, if we're convinced, really convinced, that truly it's impossible for you to regain your citizenship, then we'd be sympathetic. But we have to be really, really convinced. . . . I hope that clarifies, in part, the question. We're going to look at the underlying allegation that there's impossibility of performance, and unless we're really convinced, we're not going to be persuaded.[144]

The USIA feared that an exchange visitor would concoct an elaborate scheme to side-step the two-year rule. First, she would gain citizenship in a third country, usually no simple matter. That act, by operation of law, would cause her to lose citizenship in her home country. No longer a citizen of her native country, she then would be unable to reside there for two years. And then, she would claim that it was impossible to comply with INA § 212(e) and apply for a waiver. Just in case throngs of exchange visitors were able to pull all this off, the USIA was ready with its policy: No waiver would be available. Fortunately, that hard line approach will not necessarily be

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143. *Id.*
144. Les Jin 1999 Remarks, *supra* note 104.

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followed by the Department of State, which has indicated it might be more sympathetic to the impossibility of performance argument.[145]

My Country No Longer Exists

Where does someone comply with the two-year rule if her country of nationality no longer exists? Suppose an exchange visitor had been a citizen of the former Soviet Union. Where does she go now to comply with § 212(e)? Here's what the USIA said about that in 1999:

> That's a very good question and it's an intriguing question . . . and the answer to that one is, I don't know yet, but that doesn't mean we haven't thought about it. We've thought about it a lot, we've discussed it a lot, we may or may not have internal disagreements. . . . We're trying to track down whether there was some prior guidance from the Department of State on this issue. . . . The Soviet Union thing, I think, is still an open question and one view is that if you came from the Ukraine, even when it was part of the Soviet Union, you should go back to the Ukraine. Another view, which I think is at least credible, is that if you came from a part of the Soviet Union that happened to be the Ukraine, you still came from the Soviet Union, so maybe you should be able to go back to any part of the Soviet Union. So, we're definitely looking at that.[146]

Several years later, the question came up again. The State Department was asked how it would handle the fulfillment obligation of someone who had entered on a J visa from a country that had fallen apart by the time the exchange visitor went back to satisfy her § 212(e) obligation. For example, would the State Department require that someone who had come from Ukraine fulfill in Ukraine, or could she do so in any member of the Commonwealth of the Independent States (CIS)? "That," said the State Department official, "is a good question. Here, the sending country is different from the receiving country. We would try to be reasonable on that. The CIS is closer to what was before, so I think there's a basis to be more generous there."[147]

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145. Fischel 2002 Remarks, *supra* note 5.

146. Les Jin 1999 Remarks, *supra* note 104. For an early decision on this issue, see *Matter of Koryzma*, 13 I. & N. Dec. 358 (BIA 1969). In that case the alien was born in Austria to Polish parents and resided in Chile from an early age until he came to United States as a student in 1964. He returned to Chile in 1966 to visit his parents, and his school sent him an IAP-66, not an I-20, to return. When he entered on that IAP-66, he presented not a passport, but a travel document issued by Chile valid "only to leave the country." By entering he became subject to INA § 212(e). The alien married a U.S. citizen and applied for adjustment of status. His lawyer argued that he was not a citizen or permanent resident of Chile, and that he was in fact stateless. The argument failed to sway the Board. He was ordered to leave the United States to comply with § 212(e).

147. Fischel 2002 Remarks, *supra* note 5.

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A League of Nations

Related to the question of where to fulfill when you can't go home again is the question of where to fulfill when you can go back to more than one country. Since 1970, the statute has demanded that an exchange visitor return either to his country of nationality or last residence.[148] By regulation, "last residence" has been deemed to be last "legal permanent residence," and by practice, the State Department has insisted that the exchange visitor has no choice in which country to fulfill the foreign residence requirement: It must be in the last country before admission in J status.[149]

With the establishment of the European Union (EU), and the ability of nationals of member states to work in any other member EU state, there may now be a little movement on this issue. Asked if a national of Italy, for example, may fulfill in France, the State Department had this to say in 2002:

> That would be nice if the statute read that way. It's pretty specific about country of residence or nationality. There's actually been proposals to amend it to accommodate the EU, but until the amendment is in place, the statute is straightforward.[150]

For now, the answer is still what it has been since 1970: Fulfill in country of nationality or last legal permanent residence, no choice given. But if the statute is amended to accommodate fulfillment in any member of the European Union, Congress will have taken the law almost full circle and return it to where it was in 1956. In that year, Congress amended the Smith-Mundt Act to provide that an exchange alien may fulfill the foreign residence requirement in a cooperating country *or countries*.[151] It is to be hoped that if fulfillment in any of the European Union member states is permitted, the law will also provide that one may aggregate the two years in any combination of those nations.

QUALITY OF FULFILLMENT

In 2001, the State Department participated in a panel on J-1 issues at the AILA annual conference. There was a question on the "quality" of fulfillment, concerning whether incremental compliance fulfills § 212:

> Q. Could you please say a few words on what the State Department recognizes for fulfillment of the two-year home residence requirement. In other words, is it any type of stay in the home country post J-1? Say a person finishes the program but then is here as an F or an O.

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148. INA § 212(e), 8 U.S.C. § 1182(e).
149. *See, e.g.*, Fischel 2002 Remarks, *supra* note 5.
150. *Id.* To date, we have heard nothing further about the proposed amendment.
151. *See supra* note 24 and accompanying text.

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> A. The statute says the return requires residence and physical presence. So if one returns home for two weeks for a vacation to a residence abroad then that's two weeks out of the 104 weeks and will satisfy the requirement . . . .Incremental is fine with me. The residence, as far as I'm concerned, is defined by the statute under 101(a)(33), your place of general abode.[152]

Earlier, in 1998, the USIA expressed a rather lenient view, at least as applied to Canadians:

> 19. Would USIA please confirm that a former exchange visitor who is a Canadian citizen and therefore visa exempt, may comply with the two year home residence requirement by living in Canada and working in the United States? In this scenario, the former visitor has a home in Canada, children attend school in Canada, taxes paid in Canada, health insurance paid in Canada and all other ties are in Canada, and the only U.S. tie is employment in the U.S. in H-1B status.
>
> 19. *Yes. USIA confirms this [again].*[153]

By the 2003 annual conference, however, the State Department view on quality of fulfillment seems to have become more restrictive:[154]

> Q. Last question. What periods of time. . . . or how do you calculate periods spent in fulfillment of the two-year home residence requirement? Is it (1) it does have to be in periods following the expiration of the period of J-1 exchange visitor status . . . . That is a given . . . but is it *any* period of physical presence or does there have to attach some *quality* of that physical presence?

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152. The answer was provided by Stephen K. Fischel, Director, Office of Legislation, Regulations and Advisory Assistance, Visa Office, U.S. Department of State, on the panel "J-1 Programs and Waivers," at the 2001 AILA Annual Conference (conference tape no. 5).

153. Draft Liaison Meeting Minutes between AILA and the USIA (Oct. 30, 1998) *available at* http://www.aila/org/infonet (last visited Oct. 29, 2003) (document no. 98103090). This view was confirmed by the State Department at the 2003 AILA annual conference. "Winning J-1 Waivers: 'One for the Gipper,' " *supra* note 4 (conference tape 64). The USIA and State Department position on this question is quite interesting. On the one hand, it reflects a strict and accurate interpretation of § 212(e). That statute requires a former J-1 who is subject to its restrictions to *reside* and be physically present for two years in the country of his nationality or last residence. Here, the alien is clearly complying by *residing* in Canada, although working in the United States. But what about the "program and policy" considerations that inform so many decisions handed down by the State Department in considering waiver requests and advisory opinions? Suppose that the former J-1 in question is a research scientist, and was subject to § 212(e) because he received Canadian-government financing to study at a U.S. university. Normally, he'd have to return to Canada to share his newly gained expertise with the country that supported him, a bedrock "program and policy" goal. That would be accomplished by working in his research area in Canada for at least two years. Yet under the USIA and State Department view, the two-year requirement may be fulfilled by the former exchange visitor simply sleeping in Canada every night. This is another example of the inconsistency and illogic of "fulfillment" law.

154. "Winning J-1 Waivers: 'One for the Gipper,' " *supra* note 4 (conference tape no. 63).

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A. This also would be on the top of your list of discussions here. The way I read the statute, it says the individual has to be resident and physically present for two years, and physical presence is one thing and resident says a little bit more. So, we have to work that one out. I want to see what the legacy USIA policy has been on this and any legislative history as we work through the regulations on that. Why would it say resident if it didn't mean anything?

Q. It doesn't say resident. It says reside.

A. Residence is defined in the statute as the principal dwelling place.

Q. How about the folks that have multiple residences? Many folks do.

A. That works.

Q. And what you need to do is document the fact that you have multiple residences. That when you go back for your vacation in F-1 status or in O status that you have a residence in your home country and that you are not staying at the Motel 6.

A. I think you can prove that. But I think the statute says "reside" for some reason and if you are residing in the United States and just taking vacations one week a year, I think that you may have a problem.[155]

According to the FAM, the residence requirement does not mean that an alien must maintain an "independent household." "If the alien customarily resides in the household of another, that household is the residence in fact."[156] That interpretation implies that the "quality" of residence need not be high to satisfy the foreign residence requirement.

Even the laws governing citizenship in the United States allow for aggregating periods of residence in this country. To apply for naturalization, a person must be a lawful permanent resident for three or five years, depending on how the person obtained permanent resident status.[157] The person must also have been physically present in the United States at least half of that time.[158] It's a mere counting of days (preferably, with no one absence longer than six months and certainly not longer than a year).[159] You can be here every other day. You can be here for five months and gone for five months. If

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155. You may have a problem, but you shouldn't. It's a dubious proposition that the drafters of the exchange visitor legislation contemplated fulfillment of the two-year rule with substantial, uninterrupted periods of physical presence abroad. For example, one of the earliest Certificates of Eligibility for Exchange Visitor Status, the DSP-66 issued in 1957, contains this language in the statement to be signed by the exchange visitor: "I understand that the following conditions are applicable to exchange visitors: . . . h. Exchange visitors are not eligible for immigrant visas until after they have *accumulated* 2 years residence in a cooperating country or countries. . . ." H.R. REP. No. 87-721, *supra* note 27, at 51 (emphasis added). The plain meaning of "accumulate" as found in Webster's New World Dictionary, 2d College ed., at 10 (1980) is "to pile up, collect, or gather together, *esp. over a period of time*" (emphasis added).

156. 9 FAM § 41.11 n.2.1.

157. INA § 316(a), 8 U.S.C. § 1427(a).

158. *Id.*

159. INA § 316(b), 8 U.S.C. § 1427(b).

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aggregating days is good enough to allow someone to become a naturalized U.S. citizen, why isn't it good enough to fulfill INA § 212(e)?

REGULATIONS

Just in case there was not enough confusion surrounding INA § 212(e), the State Department regulations add a little more. The current definition of "exchange visitor" found at 22 C.F.R. § 62.2 provides:

> Exchange visitor means a foreign national who has been selected by a sponsor to participate in an exchange visitor program and who is seeking to enter or has entered the United States temporarily on a J-1 visa. *The term does not include the visitor's immediate family.* (Emphasis added.)

Next, review the definition of home-country physical presence requirement, found in the same section. It means:

> the requirement that an *exchange visitor* who is within the purview of section 212(e) . . . must reside and be physically present in the country of nationality or last permanent residence . . . for an aggregate of at least two years following departure from the United States.

Now, wait a second. By its own definitions, the State Department says the two-year rule does *not* apply to J-2 dependents because they are *not* part of the definition of exchange visitor, and *only* an exchange visitor is subject. Was it always that way?

In 1963, the regulations defined an exchange visitor as a " 'participant' . . . and the 'immediate family' "[160] and defined country of nationality or last residence as "the country of which the exchange visitor was a national at the time he acquired status as an exchange visitor or the last foreign country in which he resided before he acquired" that status.[161] In other words, the J-2 was included.

But in 1977, the definition of exchange visitor was as follows: "Exchange-Visitor means a 'participant' and the 'immediate family' of such participant as defined in this section."[162] And the home country physical presence requirement in that year was defined to mean "the requirement that a *participant* who is within the purview of section 212(e) . . . must reside and be physically present"[163] for the requisite period of time. So, who was a participant? "Any foreign national who has been selected by a sponsor to

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160. 22 C.F.R. § 63.1(f), *as added by* 28 Fed. Reg. 1630 (Feb. 21, 1963).
161. 22 C.F.R. § 63.1(g), *as added by* 28 Fed. Reg. 1630 (Feb. 21, 1963).
162. 22 C.F.R. § 63.1 (1977).
163. 22 C.F.R. § 63.1(g), *as added by* 28 Fed. Reg. 1630 (Feb. 21, 1963).
22 C.F.R. § 63.1 (1977).

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participate in an Exchange-Visitor Program and who is seeking to enter or has entered the United States temporarily on a J-1 visa, or who is seeking to acquire or has acquired such status after admission."[164] In other words, *not* a J-2.

In 1993, the regulations changed. "Exchange visitor" was defined as "a foreign national who has been selected by a sponsor to participate in an exchange visitor program and who is seeking to enter or has entered the United States temporarily on a J-1 visa. The term does not include the visitor's immediate family."[165]

In that year, the home-country physical presence requirement meant, "the requirement that an exchange visitor who is within the purview of section 212(e) . . . must reside and be physically present in the country of nationality of last legal permanent residence."[166] In other words, *not* a J-2.

That means that, for the most part, the exchange-visitor regulations have not imposed the two-year rule on immediate family members. So then how are they subject? For that, one has to look for another provision in the Department of State regulations:

> If an alien is subject to the 2-year foreign residence requirement of INA 212(e), the spouse or child of that alien, accompanying or following to join the alien, is also subject to that requirement if admitted to the United States pursuant to INA 101(a)(15)(J) or if status is acquired pursuant to that section after admission.[167]

A similar provision is found in the USCIS regulations:

> A spouse or child admitted to the United States or accorded status under section 101(a)(15)(J) of the Act to accompany or follow to join an exchange visitor who is subject to the foreign residence requirement of section 212(e) of the Act is also subject to that requirement.[168]

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164. *Id.*

165. 22 C.F.R. § 514.2 (1993).

166. *Id.* The authors studied the USIA's notice of proposed rulemaking, 57 Fed. Reg. 46,679 (Oct. 9, 1992), and its notice of final rulemaking, 58 Fed. Reg. 15,180 (Mar. 19, 1993), and found nothing to account for the changes in the definitions of these terms.

167. 22 C.F.R. § 41.62(c)(4) (2003). This provision was at 22 C.F.R. § 41.65(b)(3) before the change in numbering of the State Department regulations in 1987. For an explanation of the reorganization of the Department's visa regulations, see 52 Fed. Reg. 42,590 (Nov. 5, 1987).

168. 8 C.F.R. § 212.7(c)(4) (2003). In 1983, when § 212.7(c)(4) read as it does today, AILA asked the USIA this question:

> Under what interpretation is a J-2 visa holder considered to be subject to the two-year foreign residence requirement and why would that interpretation not also apply so as to enable the J-2 to seek a waiver?
>
> A. In this situation a J-2 was seeking a waiver and was told that J-2s couldn't seek a waiver. See 8 CFR Sec. 212.7. The spouse or child accompanying or following to join is also subject [to] the two-year foreign requirement. U.S.I.A. has always said that the J-2 gets derivative status through the J-1 and whatever law applied to the J-1 applies to the J-2. If there is a divorce or death of the J-1, then they look at the J-2's status independently. It was felt that this

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So according to one set of regulations, the J-2s are subject to INA § 212(e). According to another, they are not. Does this make any sense? Of course not. But nothing in this area does. As Winston Churchill once stated in another context, "it is a riddle wrapped in a mystery inside an enigma."[169]

HYPOTHETICALS

It may be useful to consider a few not-so-hypothetical questions to underscore how unworkable the two-year return rule is for J-2 dependents and why it should be abolished.

1. Let's start with a question we posed earlier. A J-2 spouse who is a citizen of Nigeria had spent four years in England studying before entering the United States on an F-1 visa to complete graduate studies here. In the middle of her studies, she married a J-1 research scholar receiving U.S. government funding, quit school for a while, and changed her status to J-2. Her husband is a U.K. national and a landed immigrant of Canada, where he was living before coming to the United States. They both plan to return home for two years after his research is complete, and then hope to return to the United States. Where does she go to fulfill the § 212(e) obligation?

In all of our reading of close to fifty years of exchange visitor literature, we have never seen any reference to, no less an answer for, the question of where the J-2 spouse fulfills: in her country or her spouse's. Although one State Department official has stated informally that she must return to her husband's fulfillment country, some practitioners have assumed that she returns to her own country of nationality or last residence.

Let's add some facts to our hypothetical. Assume that a year after changing status to J-2, this Nigerian woman decides to go back to school. She obtains an F-1 visa and then completes a doctorate in microbiology, writing a dissertation on tropical diseases. She has been offered a position by the department of health in Nigeria to conduct research into the treatment of malaria. She would like to take the position for at least two years, while her husband fulfills his § 212(e) obligation. Can she do so and have those two years count as fulfilling her § 212(e) obligation?

Would it make any sense at all for this J-2 spouse to be forced to go with her husband – and we still don't know to which country he's obligated to return – when she would be making a far more useful contribution by going

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was a good question. *Mr. Fruchterman could not find a basis in law for the INS regulation,* though he said he doesn't disagree with it.

Report of the Meeting of the Committee on Alien Physicians and Nurses of the American Immigration Lawyers Association with Richard L. Fruchterman, Assistant General Counsel, United States Information Agency and His Staff (Dec. 13, 1983), *reprinted in* 4 AILA MONTHLY MAILING 284, 287 (July 1984) (emphasis added.) If we may editorialize, Mr. Fruchterman could not find a basis in law for the regulation because there was none in 1983, when the liaison committee met, and there is none today.

169. Winston Churchill, radio broadcast (Oct. 1, 1939), *reprinted in* BARTLETT'S FAMILIAR QUOTATIONS 743 (15th ed. 1980).

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back to Nigeria? Does it serve any program or policy interest of this government or the exchange program for this woman to have to go to the United Kingdom or Canada, countries not known for their struggles against malaria, to fulfill a residence requirement incurred by her husband?

2. A dual national couple, both citizens of Israel and the United Kingdom, have come to the United States for the husband to work as a research scholar in a university's department of Ural-Altaic languages. He is receiving U.S. government funding. They were living in Israel when they came to the United States, but would like to spend the fulfillment years in England, where the husband has been offered a grant to study at the University of Cambridge. Can they fulfill there?

What possible interest does the United States have in the question of which country this couple returns to? Why should the long arm of our laws reach out and tell them where they must reside over the next two years to be able to return to the United States with an H-1B, L-1, or immigrant visa?

3. A Pakistani physician came to the United States on a J-1 visa to engage in graduate medical training. His son, 13 years old at the time, accompanied him in J-2 status, as did his wife. The doctor did a residency here, then a fellowship, and the family stayed for five years. The doctor leaves the United States, but does not go back to Pakistan, the country that issued the physician-need statement. Instead, he goes to Uganda, where he has been offered a challenging position as an infectious diseases doctor heading up an AIDS program in that country. When he leaves to go to Africa, his son, now 18, wants to study at a U.S. university. He goes abroad, obtains an F-1 visa, and returns to the United States to complete four years of university, and later, five years of doctoral studies in toxicology. He is now 27, and has been offered a research position by a top U.S. pharmaceuticals company, which offers to sponsor him for H-1B employment.

The way things stand today, this former J-2 toxicologist cannot secure an H-1B visa abroad. He never fulfilled the two-year obligation, and neither did his father, who never planned to come back to the United States, except for short-term visits. State Department rules do not permit a J-2 to independently seek a waiver of § 212(e) obligations except upon the death of the J-1 or in the case of spouses, the divorce of the J-1 and J-2.[170] While there may be some flexibility in State Department rules, this particular toxicologist, a great admirer of the certainty of scientific measurement and analysis, does not know what to make of the Department's response to his case: "Send it in, and we'll look at it."[171] Or must he try to secure a spot in an exchange visitor program himself, change his status to J-1, and then apply for his own waiver? Does this make any sense?

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170. 9 FAM § 40.202 n.3. *See also* former INS Operations Instructions (OI) 212.8(e)(2).

171. While immigration attorneys have learned to live with the vagaries of changing rules and no regulations, clients are not particularly adept at living under the chaos theory.

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4. A dual national of Egypt and Canada graduates from a medical school in Quebec. He would like to do his residency in internal medicine at a hospital center in Los Angeles. Canada will not issue the physician need statement for primary care medicine, so the doctor gets that statement from Egypt, and comes to the United States with his French wife, who is also a landed immigrant in Canada. Because Egypt has issued the need statement, he can't fulfill his two-year obligation in Canada, the country of his nationality *and* his last permanent residence. Instead, as the State Department now seems to insist, he must go back to Egypt. And his wife? Where does she fulfill the two-year residence requirement?

The examples can go on and on.

CONCLUSION

Let's stand back for a second and view the situation from a historical perspective. In 1961, the year the Fulbright-Hays Act was passed, John F. Kennedy was sworn in as President, President Wilson's widow died, and continental drift was introduced as a revolutionary theory. The United States broke diplomatic relations with Cuba, East Germany erected the Berlin Wall, the Soviet cosmonaut Yuri Gagarin had us worried when he became the first man to orbit the earth, the Bay of Pigs fiasco took place, Freedom Riders were testing segregationist policies in the South, IBM made a breakthrough by introducing the Selectric typewriter (the one with the bouncing ball type), South Africa withdrew from the British Commonwealth after a rift over apartheid, and Henry Miller's *Tropic of Cancer* was taken off the banned list and legally published in the United States. Does all this sound dated?

It's now 2004. If the legislative history and regulatory chaos are not enough to persuade one that J-2s should not be subject to § 212(e), consider this. These days couples are no longer expected to be joined at the hip. Congress has already recognized this in other contexts. For example, in early 2002 it enacted legislation granting separate work authorization for spouses of intracompany transferees (L-1), treaty traders (E-2), and treaty investors (E-1).[172] Congress also allows women to obtain permanent resident status apart from their spouses if they have been battered or obtained a divorce.[173] Similarly, Congress and the agencies should not tie J-2s to the two-year residence requirement of INA § 212(e) if their spouses are subject.

In summary, J-2s should not be subject to § 212(e). First, there is virtually nothing in the legislative history that suggests that Congress intended to bind them to the two-year rule, and since 1970, the statutory language specifically

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172. Pub. L. No. 107-124, 115 Stat. 2402 (adding INA § 214(e)(6), 8 U.S.C. § 1184((e)(6)) (work authorization for spouses of E visa holders); Pub. L. No. 107-125, 115 Stat. 2403 (2002) (adding INA § 214(c)(2)(E), 8 U.S.C. § 1184(c)(2)(E)) (work authorization for spouses of L-1 visa holders). *See generally* memorandum from William R. Yates, INS Dep. Exec. Assoc. Comm'r, to the field, File No. HQ 70/6.25, 6.2.12 (Feb. 22, 2002), *reprinted in* 7 BENDER'S IMMIGR. BULL. 341 (Mar. 15, 2002), and *discussed and reproduced in* 79 INTERPRETER Releases 338, 343 (Mar. 4, 2002).

173. *See generally* IMMIGRATION LAW AND PROCEDURE, *supra* note 4, at § 42.05.

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excludes them from the rule's embrace. Second, even if subject, J-2s (as well as J-1s) should be free to return to either their country of nationality or their last residence, whichever they prefer, or a combination of both, and J-2s should be able to return to *their* country of nationality or last residence *or* that of their spouse's. Third, Congress should review the exchange visitor program and abolish the two-year residence rule. It is antiquated. It is unworkable. It makes no sense. Like 1961, its time has come and gone. A new rule is needed for a new century.

SLIDE RULES
(OR, HOW THE REGULATIONS CHANGED THE LAW)*

COUNTRY OF NATIONALITY OR LAST RESIDENCE DEFINED

"As used in this part, the term 'country of his last residence' means either the country of which the exchange visitor was a national at the time he acquired status as an exchange visitor or the last foreign country **in which he resided** before he acquired status as an exchange visitor." 22 CFR § 63.1 (2/21/63)

"Country of his nationality or his last residence means either the country of which the exchange visitor was a national at the time he acquired status as an exchange visitor or the last foreign country **in which he had permanent *or* legal residence** before he acquired status as an exchange visitor." 22 CFR § 63.1 (3/23/72)

"Country of nationality or last residence means either the country of which the exchange visitor was a national at the time status as an exchange visitor was acquired or the last foreign country in which the visitor had **permanent *or* legal residence** before acquiring status as an exchange visitor." 22 CFR § 63.1 (11/17/77)

"Country of nationality or last **legal** residence means either the country of which the exchange visitor was a national at the time status as an exchange visitor was acquired or the last foreign country in which the visitor had a **legal permanent residence** before acquiring status as an exchange visitor." 22 CFR § 514.1 (3/26/79)

EXCHANGE VISITOR'S GOVERNMENT DEFINED

"[M]eans the government of the exchange visitor's nationality or the country where the exchange visitor has a legal permanent residence. 22 CFR § 514.2 (This defined term appears in the regulations for the first time on 3/19/93.)

HOME-COUNTRY PHYSICAL PRESENCE REQUIREMENT DEFINED

"[M]eans the requirement that a **participant** who is within the purview of section 212(e) of the Immigration and Nationality Act. . .must reside and be physically present in the country of his nationality **or his last residence** for an aggregate of at least 2 years following departure from the United States...."
22 CFR § 63.1 (3/23/72)

"[M]eans the requirement that a participant who is within the purview of section 212(e) of the Immigration and Nationality Act. . .must reside and be physically present in the country of nationality **or last residence** for an aggregate of at least 2 years following departure from the United States...."
22 CFR § 63.1 (11/17/77)

"[M]eans the requirement that a **participant** who is within the purview of section 212(e) of the Immigration and Nationality Act. . .must reside and be physically present in the country of nationality or **last *legal permanent residence*** for an aggregate of at least two years following departure from the United States...." 22 CFR § 514.1 (3/26/79)

"[M]eans the requirement that an **exchange visitor** who is within the purview of section 212(e) of the Immigration and Nationality Act ...must reside and be physically present in the country of nationality or last legal permanent residence for an aggregate of at least two years following departure from the United States...." 22 CFR § 514.2 (3/19/93)

EXCHANGE VISITOR/PARTICIPANT

Exchange visitor means "any foreign national who has been selected by a sponsor to participate in an Exchange-Visitor Program...." 22 CFR § 63.1(g) (12/27/57)

Participant means "a foreign national who has effected his admission into the United States as an exchange visitor or who has acquired exchange-visitor status after admission." 22 CFR § 63.1(h) (5/14/59)

"'Exchange visitor' means a 'participant' as defined in paragraph (h) **and the 'immediate family'**...." 22 CFR § 63.1(f) (2/21/63)

*All emphases were added by the authors to hightlight significant changes in the regulations.

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APPLICABILITY OF § 212(E)

An alien is subject if "[a]t the time of the issuance to him of an exchange visitor visa and admission to the United States. . .he **was** a national **or** resident of a country which the Secretary of State had designated... as clearly requiring" his skill or knowledge. 22 CFR § 41.65(b)(1)(ii) (4/11/72)

An alien is subject if "[a]t the time of the issuance to him of an exchange visitor visa and admission to the United States. . .he **is** a national **and** resident, **or if not a national he is a lawful permanent resident** (or has status equivalent thereto), of a country which the Secretary of State had designated. . .as clearly requiring" his skill or knowledge. 22 CFR § 41.65(b)(1)(ii) (8/29/72)

"The country in which 2 years' residence and physical presence will satisfy the requirements of sections 212(e) of the Act in the case of an alien determined to be subject to such requirements shall be the country of which the alien is, at the time of such determination, a national and resident, or, if not a national, a lawful permanent resident (or has status equivalent thereto)." 22 CFR § 41.65(b)(3) (8/29/72)

WAIVERS

Available if imposition of 2-year rule would "(a) impose **undue hardship *upon the exchange visitor*** that could not have been anticipated at the time exchange visitor status or the last extension of stay as an exchange visitor was granted, or (b) be clearly detrimental to a program or activity of official interest to a United States agency, or (c) impose undue restriction on a foreign national who paid a visit of 90 days or less to the United States as an exchange visitor at the request of a United States institution or agency to contribute to a project or program of the institution or agency." (Note, there is no requirement to demonstrate waiver would be in public interest.) 22 CFR 63.6 (1/1/58)

Must demonstrate waiver is in the public interest "because the two-year period abroad would (1) impose undue hardship upon an exchange visitor **who is the spouse of a United States citizen or of a lawfully resident alien** that he could not have anticipated at the time he acquired exchange-visitor status or when he accepted the last extension of stay as an exchange visitor, or (2) be clearly detrimental to a program or activity of official interest to an agency of the Government of the United States." 22 CFR § 63.6(e) (5/14/59)

"An exchange alien who believes that compliance with the foreign-residence requirements of section

Participant means "any foreign national who has been selected by a sponsor to participate in an Exchange-Visitor Program and who is seeking to enter or has entered the United States temporarily **on a J-1 visa**, or who is seeking to acquire or has acquired such status after admission...." 22 CFR § 63.1 (3/23/72)

Exchange-Visitor means "**a foreign national** who has been selected by a sponsor to participate in an exchange visitor program and who is seeking to enter or has entered the United States temporarily on a J-1 visa. **The term does *not* include the visitor's immediate family.**" 22 CFR § 514.2 (3/19/93)

J-2S SUBJECT TO INA § 212(E)

"If an alien is subject to the 2-year foreign residence requirement of section 212(e) of the Act, the spouse or child of such alien shall also be subject to such requirement if such spouse or child is admitted to the United States pursuant to section 101(a)(15)(J) of the Act for the purpose of accompanying or following to join such alien." 22 CFR § 41.65(b)(3) (4/11/72)

"If an alien is subject to the 2-year foreign residence requirement of section 212(e) of the Act, the spouse or child of such alien shall also be subject to such requirement if such spouse or child is admitted to the United States pursuant to section 101(a)(15)(J) of the Act or acquires status pursuant to such section after admission, for the purpose of accompanying or following to join such alien." 22 CFR § 41.65(b)(4) (7/31/73)

"A spouse or child admitted to the United States or accorded status under section 101(a)(15)(J) of the Act to accompany or follow to join an exchange visitor who is subject to the foreign residence requirement of section 212(e) of the Act shall also be subject to that requirement." 8 CFR § 212.7(c) (10/21/72)

J-2 EMPLOYMENT AUTHORIZATION

"Immediate family members may accept employment in the United States only if authorized to do so by the District Director of the Immigration and Naturalization Service having jurisdiction over the place where the participant is sojourning temporarily." 22 CFR § 63.24(e) (3/23/72)

"The accompanying spouse and minor children of a participant may accept employment for support (including, but not limited to, customary recreational and cultural activities and related travel) of the accompanying nonparticipating spouse and minor children in the United States if authorized by the Service. **Employment shall not be authorized if this**

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212(e) of the Act would impose **exceptional** hardship **upon his spouse or child who is a citizen of the United States or a lawful permanent resident alien** shall apply for a waiver on Form I-612." 8 CFR § 212.7(c) (1/18/62)

Waiver available **upon favorable recommendation of Secretary of State, pursuant to the request of an interested U.S. government agency, or the Commissioner of the INS** after he has determined that departure would "(1) impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or (2) be clearly detrimental to a program or activity of the Government of the United States." 22 CFR § 63.6(a) and (e) (2/21/63)

Waiver available upon favorable recommendation of Secretary of State, pursuant to the request of an interested U.S. government agency, or the Commissioner of the INS after he has determined that departure would "(1) impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or **that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution**. . . the Attorney General may waive the requirement. . . in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest." 22 CFR § 63.31(a)(2) (3/23/72); and

"The Attorney General may, upon the favorable recommendation of the Secretary of State, waive such 2-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Secretary of State a statement in writing that it has **no objection** to such waiver in the case of the alien." 22 CFR 63.31(a)(3) (3/23/72)

income is needed to support the participant...." 8 CFR § 214.2(j)(1)(v) (5/24/83)

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